

## Addendum D: Full Text of Surviving Spouses Memo

### MEMORANDUM

To: Hon. Janet Napolitano  
Secretary, Department of Homeland Security

From: Brent W. Renison  
Pro Bono Counsel, Surviving Spouses Against Deportation

Date: March 2, 2009

Subject: Widows and Widowers of U.S. Citizens

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This memorandum is intended to provide detailed information to the Secretary with respect to regulatory, legislative, and litigation options to immediately address the situation of widows and widowers of U.S. citizens who had petitioned for the spouse's immigration, but whose petitions were not adjudicated before the citizen spouse's death, resulting in agency termination of the petitions. This has been referred to in media accounts as the "widow penalty."

There are a number of simple administrative changes that the Secretary can make in order to carry out the intent of Congress and address the situation of these widows and widowers. In addition, such changes will serve to ease administrative burdens and streamline the process. Moreover, there are legislative changes that can be made to address the situation of those whose citizen spouse did not file a petition prior to death. I provide this information on behalf of the nearly 200 identified widows and widowers of U.S. citizens across our nation who look to the non-profit organization Surviving Spouses Against Deportation (SSAD) for assistance. As a founder of SSAD and pro bono counsel, I have litigated numerous cases involving these issues, and have performed exhaustive research into the history and faulty underpinnings of the widow penalty. Implementing these reforms will bring agency practice back into line with Congressional intent.

#### Summary of Recommendations:

- Rescind the Memorandum issued by Mike Aytes, Associate Director of Domestic Operations, USCIS, on November 8, 2007 – and issue a new Memorandum implementing the *Freeman* decision nationwide and abolishing the unnecessary and unlawful requirements of the Aytes Memorandum being challenged in a class action lawsuit. See *Hootkins v. Chertoff*, No. 07-05696 (CAS) (C.D. Cal., filed August 30, 2007) (challenging the substitute affidavit of support requirements and humanitarian reinstatement requirements as unlawful and *ultra vires*). Because no current regulations are implicated in this type of case, the Secretary has the option of issuing a Memorandum that makes changes to the Adjudicator's Field Manual.
- Publish a precedent decision following *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), with the concurrence of the Attorney General, pursuant to 8 CFR § 1003.1(h)(2)(i), and file the decision for publication as a precedent in future proceedings. The decision could designate a case currently in removal proceedings, such as Mrs. Maria

Paula Robledo. (See *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008). Additionally, because the fiancée adjustment procedure differs slightly from those who enter legally on other visas, the Secretary should also designate a case in which the applicant initially entered as a K-1 fiancée and married the petitioner, such as Mrs. Gwendolyn Hanford. (See *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008). Both the *Hanford* case and the *Robledo* case have received final administrative denials, and both are in removal proceedings. The Secretary's published decision should adopt the reasoning of the Court in *Freeman* and reject the reasoning of the Court in *Robinson*. Further, the Secretary should clarify that the substitute affidavit of support requirements of the Aytes Memorandum may only be required where no I-864 was ever executed by the petitioner, and further that the humanitarian reinstatement requirements are not to be applied in any case.

- Promulgate new regulations under § 205 which provide guidance to adjudicators on the lawful reasons for exercise of the revocation authority for “good and sufficient cause” such as fraud, deceit or mistake.
- Eliminate automatic revocation of petitions due to death of the petitioner and along with it the unlawful “humanitarian reinstatement” exception. The regulation should provide that properly filed petitions that were approved shall remain valid despite the death of the petitioner after approval. This simple regulatory change will eliminate government waste and ease the suffering currently endured by families that have suffered the tragedy of a death. It will also bring the regulations into harmony with the *Pierno* decision and faithfully carry out legislative intent. Current procedures on humanitarian reinstatement make it difficult to determine which agency or office has jurisdiction over the request, and entail the needless and costly transfer of files between the State Department and the USCIS, resulting in delay and wasted resources.

## Analysis

### **I. Implement the Holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) Nationwide and Abolish Automatic Termination**

Today, USCIS is deporting the widows of American citizens, automatically and without exception, where the death of the American spouse occurred before lengthy administrative visa processing could be completed. This practice is illegal and unnecessary.

The USCIS claims it cannot approve an application for permanent residence (a green card) when a spouse is killed before the bureaucracy acts on the couple's residency application - no exceptions. According to the current Administration, it all depends on the timing of the bureaucracy, not the legitimacy of the marriage. Administrative delay and the happenstance of a death are the reasons USCIS treats these cases differently. Without an administrative policy change, or a technical amendment to the immigration law, USCIS will continue to compound the loss of these surviving spouses, making them face deportation, lose employment authorization, and cope with separation from family members and the home they made with their American spouses. This injustice is not required by current law, and should be halted immediately.

On November 23, 2008, CBS “60 Minutes” exposed the Widow Penalty to a national audience in a segment hosted by Bob Simon entitled “For Better or For Worse – A Loss of Love and Country.” As Bob Simon reported in the “60 Minutes” segment, “Raquel, like all the other widows 60 Minutes met, had entered the U.S. legally. Still, immigration has been rejecting requests for permanent residence if the American spouse died before they had their immigration interview to prove their marriage was based on love. But the government can take months – sometimes more than a year – to schedule that interview. Raquel’s mother-in-law, Linda, says Raquel shouldn’t be penalized because the bureaucracy didn’t move fast enough. ‘They were doing things legally. They filed the right papers. They filed them in a timely manner. Things were not processed in a timely manner. And they’re, and then my son died. This was not something that you can foresee,’ Linda says.” (Source: CBS News, “60 Minutes”: <http://www.cbsnews.com/stories/2008/11/21/60minutes/main4625729.shtml>)

We urge the administration to recognize, as a number of Courts have recognized, that a spouse does not cease to be a spouse when the American spouse dies during routine bureaucratic processing of an immigration benefit. See *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006); *Taing v. Chertoff*, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008); *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008). Additionally, other lawsuits have begun to be filed around the country, costing taxpayers money and wasting scarce government resources. *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008); *Kells v. Chertoff*, No. 08-CV-1582-CAS (E.D. Missouri, Oct. 14, 2008); *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008); *Gorovets v. Chertoff*, No. 08-10094 (LAP) (S.D.N.Y., Nov. 20, 2008); *McKoy v. Chertoff*, No. 08-3274 (DKC) (D. Md., Dec. 4, 2008).

Government lawyers have appealed these rulings, and recently persuaded the Third Circuit that their reasoning had merit. On February 2, 2009, the Third Circuit decided *Robinson v. Napolitano, et al*, --- F.3d ---, WL 223856, No. 07-2977 (3d Cir. Feb. 2, 2009), in which the majority in a 2 to 1 decision expressly disagreed with the holding in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006).

We respectfully submit that the *Robinson* decision was not well reasoned. The majority in *Robinson* evidenced a clear misinterpretation of the “two-year rule” and failed to consider key statutes that were carefully considered by the *Freeman* court. Specifically, the *Robinson* majority held that,

“We agree with the agency that Robinson’s claim must be rejected, not because of any government bureaucracy but because she does not meet one of the Congress’ requirements for immediate relative status, i.e., that she had been married to her citizen spouse for at least two years.”

Opinion, p. 15. The majority failed to recognize that Congress did not impose a requirement that an immediate relative have been married to a citizen spouse for at least two years as a prerequisite to obtaining permanent resident status. Instead, the two year rule was only intended to guard against marriage fraud, and allow an individualized determination – not automatic termination. Indeed, 8 USC § 1186a, the statute that was enacted in 1986 before the second sentence of 8 USC § 1151 was inserted in 1990, specifically addresses those immediate relative spouses who obtain permanent resident status “by virtue of a marriage which was entered into

less than 24 months before the date the alien obtains such status by virtue of such marriage” and further makes it clear that termination of that status may not occur “through the death of a spouse.” See 8 USC §§1186a (b)(1)(A)(ii); (c)(1)(A); (c)(4)(B); (d)(1)(A)(i)(II); (g). The Ninth Circuit in *Freeman* stated it thus,

“[T]he government concedes that it had the power to grant the Freemans’ application prior to Mr. Freeman’s death (and the Freemans’ second anniversary). Had it done so, Mrs. Freeman’s LPR could not then have been voided by her husband’s death, as the statute expressly states. See § 1186a(a), (b)(1) (providing that an alien spouse who receives permanent resident status as an immediate relative before the second anniversary of her qualifying marriage does so on a conditional basis, and if the Attorney General determines that prior to the second anniversary of the alien’s obtaining status the alien’s marriage ‘has been judicially annulled or terminated, *other than through the death of a spouse*,’ the Attorney General ‘shall terminate the permanent resident status of the alien.’ (emphasis added)). This is compelling evidence that Congress did not intend its provision for a widow’s self-petition for adjustment of status to have an implicit collateral consequence of terminating a spouse’s already pending petition – particularly when the effect would be to foreclose a grieving widow from any adjustment at all ‘through the death of [her] spouse.’”

*Freeman v. Gonzales*, 444 F.3d 1031, 1042 (9th Cir. 2006). Simply stated, Congress cannot have intended a spouse who experienced a quick adjudication of (for example) three months resulting in permanent resident status, followed by the death of her spouse at four months, to be insulated from having her permanent resident status terminated (as the government must concede would be the case under 8 USC § 1186a), and at the same time have intended a spouse who experienced a long bureaucratic delay to have her petition terminated, where the death of her spouse occurred at eight months. The dissent correctly stated,

“[I]t is inconceivable to me that Congress intended an alien’s status to be contingent upon the amount of time that the executive department takes to process a timely and proper petition – a factor completely outside of the control of the alien. This interpretation creates an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely upon when the government grants the approval.”

Nygaard, J., dissenting opinion, p. 23. The dissent also properly analyzed the importance of Congress’ usage of the phrase “the spouse” in the second sentence of 8 USC § 1151(b)(2)(A)(i), and noted the deliberate use of the word “spouse” in 8 USC §1154(a)(1)(A)(i)(II), which refers to a surviving spouse. *Id.* at p. 19. In summary, the majority in *Robinson* failed to consider relevant statutes 8 USC § 1154 and 8 USC § 1186a, and viewed 8 USC § 1151 in a vacuum. A review of the entire statutory scheme including the conflict that the government position creates with respect to § 1154 and §1186a, as was undertaken in *Freeman*, results in the conclusion that Congress never intended a duly filed petition to be voided automatically upon the petitioner’s death. The *Robinson* majority also evidenced a misunderstanding of the wait times for administrative processing, assuming that it never acts fast enough to grant applications before two years of marriage. During oral argument in the *Robinson* case, Judge Sloviter, who authored the majority opinion, had this exchange with the government lawyer:

SLOVITER, J.

What happens in the rare case where the agency acts so fast that it grants all the petitions, somebody is walking around with what is called a conditional green card and the...

GOV'T.

They're fine, it's not going to be taken away.

SLOVITER, J.

Really, the, it doesn't get automatically revoked?

GOV'T.

No, no, I was trying to explain that before when I talked about the three stages of the process, and how the statute, the structure of the statute and the regulations reflect an attempt to protect the interests of, or expectations, shall we say, of the alien, more as the person goes through the process. When they get to the end of the process and they become a lawful permanent resident, they're fine. That's going to be permanent regardless of whether the United States citizen dies.

SLOVITER, J.

Even if the marriage hasn't lasted for two years?

GOV'T

That's right, that's the way the statute is written...

SLOVITER, J.

And does that happen, ever? I guess the agency doesn't act that fast.

GOV'T.

I can't say that it never happens, but as you're well aware the agency is understaffed, underfunded, and has a lot of applications before it constantly.

Contrary to the misinformation provided during oral argument by the government attorney, USCIS processing times have always been under 24 months during the relevant period of time, and now average about six months nationwide as a result of earnest backlog reduction efforts initiated in 2003. Below are some statistics on the processing times available on the USCIS website:

10/2003 average times: **21.2** months

8/2004 average times **21.7** months

[http://www.uscis.gov/files/article/BEPQ3v2\\_1.pdf](http://www.uscis.gov/files/article/BEPQ3v2_1.pdf)

2004 Q3 average times: **22.4** months

<http://www.uscis.gov/files/article/BEPQ4v7.pdf>

2004 Q4 average times: **19.8** months

<http://www.uscis.gov/files/article/BEPQ4v7.pdf>

2005 Q1 average times: **18.6** months

<http://www.uscis.gov/files/article/BEPQ1FY2005.pdf>

2005 Q3 average times: **15.2** months

<http://www.uscis.gov/files/article/BEPQ3FY2005.pdf>

2005 Q4 average times: **13.9** months

<http://www.uscis.gov/files/article/BEPQ4FY2005.pdf>

2006 Q1 average times: **13.4** months  
<http://www.uscis.gov/files/article/BEPQ1FY2006.pdf>

2006 Q2 average times: **12.5** months  
<http://www.uscis.gov/files/article/BEPQ2FY06.pdf>

2006 Q3 average times: **8.3** months  
[http://www.uscis.gov/files/article/backlog\\_FY06Q3.pdf](http://www.uscis.gov/files/article/backlog_FY06Q3.pdf)

The *Robinson* court, therefore, did not have accurate information before it, and misinterpreted the law, just as USCIS has for many years. A petition for rehearing *en banc* will be filed to request full court reconsideration of the flawed majority opinion.

Yet a simple administrative remedy is at hand. We urge the Secretary to rescind the Memorandum issued by Mike Aytes, Associate Director of Domestic Operations, USCIS, on November 8, 2007 – and issue a new Memorandum implementing the *Freeman* decision nationwide and abolishing the unnecessary and unlawful requirements of the Aytes Memorandum being challenged in a class action lawsuit. See *Hootkins v. Chertoff*, No. 07-05696 (CAS) (C.D. Cal., filed August 30, 2007) (challenging the substitute affidavit of support requirements and humanitarian reinstatement requirements as unlawful and *ultra vires*). Because no current regulations are implicated in this type of case, the Secretary has the option of issuing a Memorandum that makes changes to the Adjudicator’s Field Manual.

A preferable option, however, would be for the Secretary to publish a precedent decision with the concurrence of the Attorney General, pursuant to 8 CFR § 1003.1(h)(2)(i), and file the decision for publication as a precedent in future proceedings. The decision could designate a case currently in removal proceedings, such as Mrs. Maria Paula Robledo. (See *Robledo v. Chertoff*, No. AW-08-CV-2581 (D. Maryland, Oct. 2, 2008). Additionally, because the fiancée adjustment procedure differs from those who enter legally on other visas, the Secretary should also designate a case in which the applicant initially entered as a K-1 fiancée and married the petitioner, such as Mrs. Gwendolyn Hanford. (See *Hanford v. Chertoff*, Civ. No. SA-08-CA-0795 (XR) (W.D. Texas, Sept. 25, 2008). Both the *Hanford* case and the *Robledo* case have received final administrative denials, and both are in removal proceedings. The Secretary’s decision for publication should adopt the reasoning of the Court in *Freeman* and reject the reasoning of the Court in *Robinson*. Further, the Secretary should clarify that the substitute affidavit of support requirements of the Aytes Memorandum are only appropriate where no I-864 was ever executed by the petitioner, and further that the humanitarian reinstatement requirements are not to be applied in any case.

The Aytes Memorandum imposes an unlawful requirement that the beneficiary “present a request under 8 CFR § 205.2(a)(3)(C)(2) for humanitarian reinstatement, supported by a properly completed Form I-864 from an individual who qualifies under § 213A(f)(5)(B) of the Act as a qualifying substitute sponsor” or the petition will automatically be revoked. Memorandum, p. 7, AFM Ch. 21.2(a)(4)(B)(2). After reviewing 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i), the Court in *Freeman* concluded that, “through our review of the language, structure, purpose and application of the statute, that Congress clearly intended an alien widow whose citizen spouse has filed the necessary forms to be and to remain an immediate relative (spouse) for purposes of § 1151(b)(2)(A)(i), even if the citizen spouse dies

within two years of the marriage.” *Freeman v. Gonzales*, 444 F.3d 1031, 1039 (9th Cir. 2006). It is the I-130 petition, filed under 8 USC § 1154(a)(1)(A)(i), which establishes eligibility for immediate relative status. With respect to the application of the immediate relative to be granted the status of Lawful Permanent Resident (LPR), certain discretionary grounds of inadmissibility may apply to bar the adjustment of status (Form I-485) or issuance of an immigrant visa and admission (Form DS-230). Those inadmissibility grounds are found at 8 USC § 1182(a). Such grounds of inadmissibility are wholly separate from the determination of eligibility for immediate relative status under 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i), and the Aytes Memorandum attempt to apply inadmissibility standards to the validity of a petition for eligibility is prohibited as a matter of law. The Ninth Circuit has held that, “determinations that require application of law to factual determinations are nondiscretionary.” *Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003). The determination of immediate relative status is non-discretionary. The Aytes Memorandum’s efforts to import discretionary criteria into the determination under 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i) are illegal. Such efforts also contravene the mandatory language of 8 USC § 1154(b), “the Attorney General shall...” *Id.*

It is unlawful to apply grounds of inadmissibility under 8 USC § 1182(a) to a determination of immediate relative status under 8 USC § 1154(a)(1)(A)(i) and 8 USC § 1151(b)(2)(A)(i). Otherwise, a spouse who would ordinarily be able to renew an application for adjustment of status in removal proceedings would be barred from that renewal avenue through the pre-emptive denial of her I-130 petition based only upon discretionary inadmissibility factors that have no place in a nondiscretionary eligibility determination. Such a denial results in the denial of due process of law implicit in the Fifth Amendment to the United States Constitution.

Specifically, the Aytes Memorandum purports to require *as a prerequisite of I-130 approval* the additional filing of a Form I-864, Affidavit of Support (hereinafter “Affidavit”) by a “substitute sponsor”, a requirement linked to the inadmissibility ground found at 8 USC § 1182(a)(4) (“Public Charge”). The substitute sponsor, according to the Aytes Memorandum, must be filed by a relative listed in 8 USC § 1183a(f)(5)(B), which under the title “Non-Petitioning Cases” limits the available sponsors to the “spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of a sponsored alien”. The Memorandum directs adjudicators to automatically revoke an I-130 petition unless an Affidavit is filed by one of these listed substitute sponsors. In cases where the citizen filed a petition, however, are not “Non-Petitioning Cases” and are instead cases in which the petitioning spouse filed the required Affidavit.

The Aytes Memorandum states that a new affidavit of support will be required for I-130 approval. Yet, 8 U.S.C. § 1182(a)(4)(C) does *not* specifically require a valid affidavit of support. Instead, that section requires that “the person petitioning for the alien’s admission (and any additional sponsor required under section 213A(f) or any alternative sponsor permitted under paragraph (5)(B) of such section) has *executed* an affidavit of support described in section 213A with respect to such alien.” 8 U.S.C. § 1182(a)(4)(C)(ii) (emphasis supplied). *Execution* of an affidavit by the petitioner is all that is required under the statute. The requirements, found at 8 U.S.C. § 1183a, defining the “enforceability” of executed affidavits of support serve merely to instruct the form and process of the affidavit, and do not add additional requirements for admission as a lawful permanent resident other than those found at 8 U.S.C. § 1182(a)(4). For



example, a petitioning sponsor may execute an affidavit of support as required under § 1182(a)(4), but during the pendency of the petition process the alien may work the last of the required 40 qualifying quarters of coverage and therefore make the affidavit of support unenforceable. See 8 U.S.C. § 1183a(a)(3)(A). The fact that the duly executed affidavit of support becomes unenforceable does not make the alien inadmissible under 8 U.S.C. § 1182(a)(4), because the petitioner and alien spouse have done all that is required under the statute. Enforceability is not required for the sponsored immigrant to be admissible - only *execution* of the affidavit by the petitioning sponsor. To maintain otherwise would lead to absurd results.

Further, even if enforceability were required at the time of admission, the Aytes Memorandum argument that the affidavit of support executed by the petitioner cannot be enforced following the death of the petitioner is not in accordance with the statute. The regulation does, in fact, state that the sponsor's obligation ends when the sponsor dies. 8 C.F.R. § 213a.2(e)(2)(ii). Yet this "enforcement ends at death" requirement is not in the statute, and runs contrary to the remedies provided for enforcement under 8 U.S.C. § 1183a(c), which include remedies to enforce obligations against a person's estate. It is true that "sponsor" is defined in the regulations as "an individual who is either required to execute or has executed a Form I-864 under this part." 8 C.F.R. § 213a.1. In cases where the petitioner filed a petition on behalf of his or her spouse, the petitioner has generally also executed a Form I-864. This is not the case of a "juridical person" attempting to execute an affidavit of support, because plaintiffs' spouses accomplished the execution of Form I-864, satisfying the requirements of the statute. Nothing further is required in such a case, and the Aytes Memorandum position that the I-130 petition should turn on a substitute affidavit of support under an unrelated provision is unfounded.

It is well established law that the determination of admissibility is not within the scope of visa petition procedure. *Matter of O*, 8 I&N Dec. 295 (BIA 1959) (<http://www.usdoj.gov/eoir/vll/intdec/vol08/Pg295.pdf>). Despite this basic tenet of immigration law, the Aytes Memorandum seeks to utilize grounds of inadmissibility in violation of law to deny surviving spouses' visa petitions, and impose unlawful humanitarian reinstatement requirements. In *Matter of O*, the Board of Immigration Appeals reviewed the denial of an immigrant petition filed by a U.S. citizen woman on behalf of her husband, a citizen of Italy. The Board noted that, "The parties were married on September 25, 1929, at Fulton, New York. The petition is supported by the birth certificate of the petitioner and by a marriage certificate. The beneficiary appears, upon the basis of the documents submitted, *prima facie* eligible for a nonquota status under section 101(a)(27)(A) of the Immigration and Nationality Act as the alien husband of a citizen of the United States." *Id.* at 295. The immigration service had denied the visa petition on the basis that the "beneficiary is ineligible to receive a visa and is inadmissible to the United States..." *Id.* at 296. The Board disagreed with the visa petition denial, and the court admonished the Service for using admissibility criteria to deny eligibility. Such actions constitute a violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

In Summary, the Aytes Memorandum should be rescinded, and the Secretary should publish a precedent decision that demands adherence to the *Freeman* holding and clarifies that no substitute affidavit of support is required where the petitioner had executed an affidavit, and



that no humanitarian reinstatement showing need be made in order to receive adjudication and approval of the petition and of lawful permanent resident status.

## **II. Implement the Holding in *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968) Nationwide and Abolish Automatic Revocation**

In addition to terminating action on pending applications, the agency has also engaged in automatic revocation of petitions that were already approved at the time of the petitioner's death. The procedure for revoking the approval of visa petitions has been misused for many decades. Yet the regulations purporting to automatically revoke a visa petition upon the death of the petitioner have been rejected repeatedly by Circuit Court of Appeals in the context of the widow penalty. See, e.g., *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968); *Freeman*, 444 F.3d 1031. Nearly two decades after the automatic revocation provisions of 8 CFR § 205.2(a)(3)(C)(2) were promulgated, the Second Circuit opined that it could "hardly imagine" that Congress intended 8 U.S.C. § 1155 to result in automatic revocation of a visa petition upon the death of the citizen spouse. *Pierno*, 397 F.2d at 951. In *Pierno*, the Court reviewed the automatic revocation of a petition approved prior to the death of the petitioner, but where the adjustment of status application had not been adjudicated at the time of the death. The appellate court explained the automatic revocation regulations as such:

[T]he Service contends that the automatic revocation of approval pursuant to Regulation 206.1(b)(2) [now 205.1], when Mr. Pierno died, precludes the Service from granting Mrs. Pierno's application for an adjustment of status. We disagree.

Section 206, under which the automatic revocation regulations are promulgated, provides:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition [for nonquota status] approved by him. . .

The section is permissive; it grants the Attorney General discretion in determining what shall constitute good and sufficient cause and whether revocation of approval shall occur or be withheld in those cases where there is good and sufficient cause for revocation. It should not be interpreted to authorize the Attorney General's wooden application of rules for automatic revocation. In *Stellas v. Esperdy*, 388 U.S. 462, 87 S.Ct. 2121, 18 L.Ed. 2d 1322 (1967), reversing 366 F.2d 266 (2d Cir. 1966), the Supreme Court remanded the cause before it for further proceedings before the Service when the Service applied its rule that petition approval is automatically revoked when the petitioning citizen-spouse withdraws his petition. Regulation 206.1(b)(1). See also, *United States ex rel. Stellas v. Esperdy*, 366 F.2d at 272-274 (Moore, J., dissenting) ("We can hardly imagine that Congress would have intended Mrs. Pierno to be deported as a result of her husband's death had he been, for instance, killed in action while the status adjustment proceedings were pending. Yet, such a result would follow from the Service's decision. The purpose of placing such

discretion regarding immigration in the hands of the Attorney General, rather than having that field governed by a detailed statute, is to give some flexibility in treating a myriad of possible situations. Regulations issued by the Attorney General should not be so applied as to frustrate that Congressional intent.”)

Id. at 950-51 (emphasis added) (alteration in original). The automatic revocation regulations found at 8 CFR § 205.2(a)(3)(C)(2) continue to frustrate the intent of Congress and are *ultra vires*. Consequently, the automatic revocation regulations do not constitute a “permissible construction of the statute” found at 8 U.S.C. § 1155, and are “arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at 843-44.

Following the Second Circuit’s 1968 opinion in *Pierno*, a proposed regulation change was published. Specifically, the proposed regulation promised,

Proposed amendments to Part 205. In § 205.1, it is proposed to include a reference to part 203(e), as amended, respecting automatic revocation of approval of visa petitions. In § 205.1(a)(2), it is proposed to delete the words “petitioner or”, and add a new § 205.1(a)(3) which will provide that a relative visa petition will not be automatically revoked upon the death of the petitioner.

41 Fed. Reg. 220, 49996, Nov. 12, 1976 (emphasis supplied). Despite the legitimate proposal to provide that a relative visa petition will not be automatically revoked upon the death of petitioner, as would have been in keeping with the decision in *Pierno*, the agency instead issued a final regulation providing for automatic revocation upon the death of the petitioner, “unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate.” 41 Fed. Reg. 248, Dec. 23, 1976. The “humanitarian reinstatement” rule was thus born, and despite its intentions continues to haunt families and their surviving relatives. The humanitarian reinstatement rules are not lawful and should be abolished. New regulations that properly reflect the intent of Congress should be promulgated after notice and comment, and should do away entirely with automatic revocation where the death of the petitioner occurs during bureaucratic visa processing, as was proposed in 1976.

Promulgating new regulations which provide guidance on the lawful reasons for exercise of the revocation authority for “good and sufficient cause” such as fraud, deceit or mistake, will be in keeping with Congress’ intent in enacting INA 205. Eliminating automatic revocation and the humanitarian reinstatement exception, and simply leaving petitions in place that were duly filed and properly approved will eliminate government waste and ease the suffering currently endured by families that have suffered the tragedy of a death. Current procedures on humanitarian reinstatement make it difficult to determine which agency or office has jurisdiction over the request, and entail the needless transfer of files between the State Department and the USCIS, resulting in delay and wasted resources. Such transfers and additional adjudication add two to four years to what should be a seamless process for grieving families. The new regulations should leave in place an approval unless good and sufficient cause is found, such as fraud, to revoke the approval.

### **III.Support Legislation for Non-Petitioning Spouses**

Despite the administrative changes outlined above, there are nevertheless cases that merit consideration in which the petition was never filed on behalf of the alien spouse or child. One example is Jacqueline Coats, a Kenyan citizen whose American husband Marlin died off of San Francisco Beach Park while trying to rescue two drowning teenage boys. He died on Mother's Day 2006, and had signed all the paperwork to petition for Jacqueline to become a permanent resident days before, but due to his death he was not able to complete the filing. He has been hailed as a hero, and received the highest Coast Guard Medal of Honor, but now his surviving spouse faces deportation. There is also Dorota Lamoree, a Polish citizen whose husband was employed as a police officer with the Rio Vista police force in California. While driving home from work he was struck head-on by a vehicle occupied by teenagers who tried passing a semi-truck in a no-passing zone. He died without having filed the petition, but had hired a lawyer at the cost of \$5,000 to initiate the process before he died. Current statutes only allow a self-petition by the surviving spouse if the marriage had existed for at least two years at the time of the citizen spouse's death. Because of the humanitarian nature of these cases, legislation has been introduced that would end the Widow Penalty for non-petitioning spouses. Bi-partisan legislation introduced in the 110th Congress, H.R. 6034 and S.3369, would have put the unfair practice of deporting widows of American citizens to rest once and for all. The bill sponsors have indicated a desire to reintroduce these bills in the 111th Congress, and I ask that the Administration consider future efforts to enact this important legislation.

## Addendum E: Additional Case Examples

### Secure Communities

- Jails routinely hold detainees well in excess of the 48 hour period permitted by regulation. In some counties, reports have indicated that people are being held for weeks before ICE assumes custody. (Grays Harbor, Yakima, Whatcom, Okanogan, Walla Walla, Benton/Franklin, Skagit counties). In February 2009, the Washington Defender Association's Immigration Project received a call from a social worker in Yakima, Washington attempting to provide services for the child of a woman taken into custody and charged with shoplifting. When the social worker contacted the jail to determine when the woman might be released, the jail official said that, even though her court-ordered jail time was to expire soon, she was likely to be held for at least several weeks, and possibly more than a month, on her immigration detainer. *Letter from Washington Defender Association's Immigration Project to Secretary Napolitano, February 16, 2009 regarding "Issues and Impacts of ICE Enforcement In Washington State Jail Facilities"*
- In Washington State, detainers are being filed indiscriminately without distinguishing serious criminal offenders from those who have committed minor offenses. Since the majority of defendants arrested are for low-level misdemeanor offenses, the majority of people being apprehended by ICE do not fit within the priorities of the Secured Communities initiative. ICE's indiscriminate placement of detainers has resulted in an increased number of U.S. citizens being significantly impacted. Many end up spending weeks or months of additional time in either the jail facility or in immigration detention trying to prove their case. An immigration detainer also significantly impacts other aspects of the criminal case, e.g. release on bond, eligibility for programs and placements, prejudice in defending their criminal case. (Snohomish, Pierce and Yakima counties). *Letter from Washington Defender Association's Immigration Project to Secretary Napolitano, February 16, 2009 regarding "Issues and Impacts of ICE Enforcement In Washington State Jail Facilities"*
- In Texas, immigrant crime victims, particularly domestic violence victims, have ended up in detention as a result of the collaboration between ICE and county jails. Young children have been left with abusive spouses or other family members. *Correspondence from the ACLU of Texas.*
- US citizens and lawful residents in Texas have had their detention in jail extended because of an inappropriate ICE hold -- although ICE was quick to put the hold on - they were very hard to reach when a person wanted to provide proof of their citizenship or their LPR status. *Correspondence from the ACLU of Texas.*
- Austin, Texas had a very robust immigrant outreach program between the local police and recent immigrant communities. After the expansion of ICE's presence in the county jail - so that Class C and B misdemeanants were being screened by ICE- and the related press, both immigrant community service providers and police with beats in the immigrant neighborhoods reported an unwillingness of people to cooperate with law enforcement or report crimes. For example, an assault victim waited all weekend until

Monday so that she could talk to a worker's center staffer before reporting her assault to the Austin Police Department. *Correspondence from the ACLU of Texas.*

- Mr. O, a U.S. citizen from Colorado, is serving a criminal sentence at Bent County Correctional Facility in Colorado. He has an immigration detainer that is preventing his entry into a halfway house. Several years ago, Mr. O. was placed into removal proceedings. The immigration judge terminated the proceedings at the request of the government when they realized that he had derived citizenship from his American parents. However, even though a correctional facility caseworker has been calling ICE on his behalf, Mr. O has not been able to get ICE to look at his case and lift the immigration detainer despite his U.S. citizenship. *Correspondence from the Immigrant Defense Project.*
- A man of Dominican descent incarcerated at Federal Correctional Institution-Allenwood claimed to be a U.S. Citizen, and his statements formed the basis of a legitimate legal argument. However, ICE had placed a detainer on him so that when he is released from criminal custody he will go straight to ICE custody. The detainer made him ineligible for parole, when he otherwise would have been eligible. He claimed that this was illegal because he actually was a U.S. Citizen but would not be given an opportunity to make his case until much later—resulting in longer criminal custody when he might have been paroled if it wasn't for the detainer. *Correspondence from the ACLU of Pennsylvania.*
- A non-citizen was granted bail from Pennsylvania State criminal custody. He was ineligible for release on criminal bail because ICE had lodged an immigration detainer in his file. He couldn't challenge his immigration detention by asking for a bond hearing before an immigration judge until after removal proceedings were initiated because Immigration Judges lack jurisdiction to consider immigration bond until ICE assumes custody. Thus, the immigration detainer, which he could not contact, blocked his release from criminal custody. *Correspondence from the ACLU of Pennsylvania.*
- A young man from Mexico was charged with a DUI. He was transferred to ICE custody right away because he entered without inspection and was clearly illegally present. But, he wanted to appear for the DUI proceedings because he intended to return to the US through his USC fiancé, if possible, in the future. Because he was in ICE detention and on a track for expedited removal in a matter of days, he couldn't "do the right thing" and appear for the DUI proceedings. *Correspondence from the ACLU of Pennsylvania.*

#### **287(g) Programs**

- A man in Tucson was deported after calling the local police to report a robbery at his worksite. When the police arrived they asked him for his ID. When he showed them his Mexican "matricula consular" identification, the police didn't ask any further questions, but handcuffed him and called Border Patrol. This occurred despite the lack of a formal 287(g) relationship between ICE and the Tucson police. The deported man has a wife in the United States who is also undocumented, 3 young US citizen children, and had lived in this country for many years with no criminal record. Less than a week after his deportation, the man paid a lot of money and walked two days and two nights in a dangerous decision to return to his wife and children because he felt he could not leave

them here alone. The man's wife has powerfully spoken about how it would have to be a "life or death emergency" for her to ever call the police again after what her husband experienced. She believes the "ugly" questioning, detention, and deportation that her husband endured would be even worse for a woman. *Correspondence from Arizona immigration attorney, February 2009.*

- A Florence Project client was in the Maricopa County Jail in Arizona for 2 months after prosecution under the Arizona anti-smuggling law for conspiracy to smuggle himself (he entered the United States with a group led by a coyote). He was 17 and too afraid to say he was a minor. When his criminal custody concluded, he was placed in removal proceedings and was screened by Florence Project attorneys who successfully pursued an SIJS visa on his behalf. *Correspondence from Lindsay Marshall, Florence Immigrant and Refugee Rights Project Executive Director, February 2009.*
- ICE's Newark, NJ Field Office reports that a third of cases referred by law enforcement are dropped because the police mistakenly refer a legal resident or because the person didn't commit a serious enough crime. *"Illegal immigrants fear police-reporting policy," Courier-Post, Deborah Hirsch, November 30, 2008.*
  - Marco Antonio Jimenez, a painter from Mexico, was stopped for speeding in Burlington Country in August 2008, arrested for unpaid speeding tickets, and referred to ICE. He had lived in Pennsauken, New Jersey for seven years and hadn't paid the tickets because of financial difficulties. After his arrest, he paid the money he owed for the speeding tickets. In October 2008, he was ordered to self-deport by February 2009. Jimenez said he understood the risks of living in the United States without documents, but was disappointed that the federal government would target a hardworking person who had started a business and paid income tax. "I never sold drugs; I never had an arrest for gangs. I was never in jail. I was just working, working," he said.
  - Aurelio Torres was a passenger in his friend's car when the driver was stopped for ignoring a stop sign. The police asked Torres for his ID, and arrested him after checking his Mexican ID against a national crime database. The police claimed that he had the same name as a wanted criminal and took Torres to the police station. After realizing they were mistaken, the police released Torres and never called immigration officials. The experience left Torres with a distrust of the police. "You say you are someone and they don't believe you just because you're Hispanic," he said.
- Octavio, a Guatemalan immigrant living in Phoenix, was robbed of \$140 and left bruised and bloodied by four men while walking to his neighborhood grocery store. Octavio was found by the police, but declined to prosecute because he is afraid of being deported. Guatemalans living in Phoenix say that attacks like Octavio's are frequent, especially on the weekend when immigrants are likely to be carrying cash. Andres Felipe, a Guatemalan who agreed to talk about the robberies, said, "We need help. We need protection. But we don't know where to go." *"Deportation-wary migrants targets of crime; Criminals counting on fear of police, experts say," The Arizona Republic, Daniel Gonzalez, October 29, 2008, available at*



<http://www.azcentral.com/arizonarepublic/news/articles/2008/10/29/20081029victimized1029.html>

- Although she was not speeding and was driving appropriately, Janet Perez-Rodriguez was stopped by a police officer in Iowa while driving her husband to work. The police officer followed her to a gas station and asked for her ID. She does not speak English and did not know why she had been stopped. When Ms. Perez-Rodriguez handed the officer a Mexican consular ID card, he directed her into the patrol car, even though her five year-old and 3 month-old children were crying in the family car. When her 12 year-old son returned from inside the station the officer made him act as an interpreter. The officer told the family to call someone with a driver's license to pick up their car, but Ms. Perez-Rodriguez believes that he had already called a tow truck. It arrived within minutes and took the car. The incident left Ms. Perez-Rodriguez and her family concerned that the police officer had targeted them for mistreatment because they are Latino. She was driving carefully and feels as though she was stopped simply because of her family's ethnicity. Her twelve year-old, who was forced to interpret, and five year-old became afraid of the police, grew nervous when they saw patrol cars, and had trouble sleeping. Ms. Perez-Rodriguez stated, "Please, please I will pay whatever penalty you believe is due, but please talk to the officials in charge because it is not fair that our children live in terror (I know my children are not the only ones...many of our neighbors and friends have had similar experiences)." In May 2008, after ten years of working in the United States, Ms. Perez-Rodriguez and her family, including two U.S. citizen children, returned to Mexico. *Written testimony of Hilda Jeanette Perez-Rodriguez, provided by American Friends Service Committee.*
- Rocky Mountain Immigrant Advocacy Network was contacted by a woman who was arrested by the Colorado State Patrol during a routine traffic stop. Because the Colorado State Patrol has entered into a 287(g) agreement with ICE in Colorado, the woman was almost immediately deported to Mexico without the opportunity to speak to an attorney or learn about her legal rights. Unfortunately, because of the officer's likely unfamiliarity with immigration law, he did not explain to the woman that she might be eligible for relief from removal from the US. Rather, the woman believed her only option was leaving the county as soon as possible, and believed the officer was doing her a favor by allowing her to sign a voluntary removal order rather than putting her into proceedings before an immigration judge. However, the woman had been the victim of severe domestic violence in the United States and had helped law enforcement in the prosecution of that criminal case, and thus was eligible for a U Visa. Nonetheless, she only learned about her rights and her eligibility after calling RMIAN from Mexico, subsequent to her deportation and separation from her entire family in the United States. *Correspondence from the Rocky Mountain Immigrant Advocacy Network (RMIAN), Colorado.*
- Ms. Adriana Torres-Flores was held by the Washington County, Arkansas Sheriff's office without food, water or bathroom facilities for four days in a nine foot by ten foot holding cell. Her calls for help went unheard because her jailer had left early for the weekend because of a snow storm. She drank her own urine to survive. The Sheriff's office employee responsible for Ms. Torres-Flores forgot about her and failed to contact the Washington County 287(g) certified jail to arrange for transportation to that facility.



*Letter to Attorney General Mukasey from MALDEF, April 1, 2008; "Halt sought in local efforts to enforce immigration laws," Northwest Arkansas Times, Scott F. Davis, April 6, 2008, available at <http://www.nwanews.com/nwat/News/63873/>.*

- A non-citizen was given U-visa deferred action status in 2006 and now has a pending application for a U-visa. The local prosecutor was instrumental in his getting a U-visa because of his assistance with a criminal prosecution. He had been the victim of a horrific crime in which he was shot two times while he was working at a local store. He had called the police as he lay bleeding in his mother's arms, identified the shooter and accomplices and testified at their trial. He has been stuck at a local jail on an ICE detainer even though the minor criminal charge against him will likely be dismissed. The detainer is preventing his release on bail, and will prevent him from being released even when the charge is dismissed. He has an 11-month old U.S. citizen baby who he helps support financially and for whom he is often the primary caregiver. This man's attorney has called ICE repeatedly to explain his deferred action status and pending application, but has been told that ICE will not lift the detainer. Instead, he will be taken into ICE custody and placed into removal proceedings. This will only delay his release and cost time and resources for everyone involved - the person, his family, the non-profit agency providing legal representation and the government. *Correspondence from the Immigrant Defense Project.*
- A man from Africa was stopped by police in Denver. The police asked for his documents and when he could not produce proof of legal status, he was taken into ICE custody and placed in removal proceedings, despite having no criminal history. This man fears returning to his country because of persecution on account of his membership in a particular social group and political opinion. In his native country he had been a student demonstrator against the government. He is now fighting for asylum and withholding of removal. *Correspondence from Rocky Mountain Immigrant Advocacy Network (RMIAN), Colorado.*
- A man from Mexico was riding as a passenger in a van traveling to see his wife. When the police asked him for his documents, he was unaware of his right to remain silent. As a result, he was arrested and placed in removal proceedings. Although his wife is a U.S. citizen who had filed a visa petition on his behalf, he was ordered removed at his first master calendar hearing. His 3 U.S. children and his wife continue to live in the U.S. without him. *Correspondence from Rocky Mountain Immigrant Advocacy Network (RMIAN), Colorado.*
- A man from Central America was stopped in Aurora, Colorado for a broken head light. As is customary, the police officer asked for his license, registration and insurance. The man was unable to produce the documents. The police officer arrested him, but filed no traffic charges against him. Instead, the officer immediately transferred him to ICE custody and the man was placed in removal proceedings. The man stated that he had been the victim of a serious assault and cooperated with the police. For this reason, he was potentially eligible for a U Visa. Luckily, this individual was able to pay his bond. However, had his bond been any higher, this person may have accepted removal or voluntary departure despite the fact that he had a valid form of relief from removal.

### **Fugitive Operation Teams**

- A person who applied for asylum without the help of a lawyer received an *in absentia* order of removal because he was too scared to go to court. He later married a U.S. Citizen, had 3 or 4 U.S. Citizen kids and was the beneficiary of an approved I-130 application. A pro bono attorney successfully moved to reopen the case, an I-485 was pending, and he had a live date to go to court to adjust his status to Lawful Permanent Resident. Prior to his court date, an ICE fugitive operations swat team came to his house, barged down the door, scared the kids, and sought to arrest him. He wasn't home and his wife gave the agents a copy of his immigration paperwork and his attorney's name and phone number. After being alerted by the wife, the attorney called the local ICE Office of Chief Counsel, who investigated and apologized. The ICE attorney relayed that the left hand doesn't know what the right hand is doing, and that the ICE "fugitive" list of names and addresses of people with final orders of removal is not rechecked through immigration databases to make sure nothing has changed. In this case, the person's removal order had been vacated and he was not a fugitive at all. Email from pro bono attorney. *Correspondence from pro bono attorney, Washington, DC, February 2009.*
- A person had at one point received a final order of removal, but was released by ICE and placed under an Order of Supervision on his own recognizance. He also had an approved I-360 and an adjustment application pending before USCIS. Without calling the pro bono attorney of record or the non-citizen to arrange an appointment, ICE sent agents out on a predawn raid to arrest him as a "fugitive." ICE didn't realize he was already under an Order of Supervision. He was detained for 90 days before his attorney could get him released. ICE was seemingly unwilling to admit their mistake in detaining him and he only was freed because the BIA entered a stay of removal. Ultimately, his case was reopened and he successfully adjusted his immigration status. Email from pro bono attorney. *Correspondence from pro bono attorney, Washington, DC, February 2009.*
- A US Citizen and attorney in San Francisco was threatened in his home by two ICE officers who bypassed the street security gate and buzzer and entered his 12-unit apartment building. The officers stated that they were looking for an individual, but had difficulty articulating the individual's name. The officers did not respond when asked if they had a warrant, and when asked to leave they stated, "that's fine, we're just going to wait here until you come out." After the attorney closed his door, one ICE officer stated, "I'm going to kick your door down." He also threatened the attorney with prosecution for alien harboring. The officers refused to leave the apartment building when asked to do so and continued to loiter directly in front of the apartment door for approximately 15 minutes. The ICE officers did not answer when asked why they were at the residence. The attorney strongly felt that by making criminal threats against his home and physical safety, threatening prosecution without probable cause or even reasonable suspicion, and refusing to respect his property rights, the ICE officers sought to dissuade the exercise of his constitutional right to be free from unreasonable searches and seizures. *Bill O. Hing,*

*Immigration Attorney Harassed at Home, Immigration Daily, Mar. 18, 2008, available at <http://www.ilw.com/articles/2008,0318-hing.shtm>*

- Adam Savitt was arrested at his home in suburban Chicago in June 2008 on a “fugitive” warrant based on a decade-old asylum denial. A Guatemalan immigrant, he had gone through a spiritual conversion, married, supported five children, and set up a successful business with his wife. He was held for a month at a county jail in Wisconsin, going without necessary medication for several days until his lawyers intervened. Adam is now back in Guatemala, separated from his wife and children who are struggling financially and emotionally without him. *Correspondence from Illinois Coalition for Immigrant and Refugee Rights.*
- In the municipality of Lynwood, Washington (a small city within King County), it is standard practice for people who show up for traffic court to then proceed to pay their fines just down the hall from the court. Latino/a appearing people are told that, in addition to paying their fines, they must also “talk to” this “other official” who is a uniformed ICE agent. They are then interrogated by the ICE official and, if believed to be undocumented, they are taken into ICE custody. Not surprisingly, appearance of persons from the immigrant communities to traffic court has dramatically decreased. *Letter from Washington Defender Association’s Immigration Project to Secretary Napolitano, February 16, 2009 regarding “Issues and Impacts of ICE Enforcement In Washington State Jail Facilities”*
- Although alerted to specific health conditions, ICE agents conducting enforcement actions in homes in Minnesota refused precautions to protect the health of detainees. *Carlos Hilario Arias v. U.S. Immigration and Customs Enforcement Division of the Department of Homeland Security, No. 07-CV-1959.*  
<http://www.aifl.org/lac/chdocs/Arias-ammcmpl.pdf>; referenced in *ABA Journal*, June 2008, “Illegal Ailens on I.C.E., Tougher immigration enforcement tactics spur challenges,” Stephanie Francis Ward, available at [http://www.abajournal.com/magazine/illegal\\_aliens\\_on\\_ice/print/](http://www.abajournal.com/magazine/illegal_aliens_on_ice/print/)
  - One detainee showed the arresting agents medical information about his pending knee surgery, yet the officers responded they didn't care and shackled the man's legs, wrists, and waist. Despite having been alerted of another detainee's nausea while transporting her to Bloomington, ICE agents refused to accommodate her, and she eventually vomited on herself. Although several of the detainees were pregnant, ICE agents took no precautions to maintain the health of these individuals or their unborn children. One detainee had suffered an ectopic pregnancy and, despite heavy bleeding, was denied use of the bathroom by ICE agents.
  - ICE agents took no precautions in transporting the detainees to protect their safety and security. They did not fasten the seat belts of the detainees and drove erratically causing the detainees to fall out of their seats in the vehicle while handcuffed.
  - Although two arrestees were nursing their infants, ICE agents refused to make accommodations for their children. After arrest and while in ICE custody, one

- detainee continued to produce and leak breast milk. ICE agents refused her a change of clothes or the means to clean herself.
- During this ICE enforcement operation, children were often left bereft and crying. ICE agents physically grabbed and separated one child from his mother, and then, while yelling and intimidating the boy a short distance from his mother, demanded information about his father. ICE agents failed to make reasonable efforts to accommodate children of detainees. The affected children now suffer from waning appetites, disrupted sleep, nightmares, and behavioral difficulties resulting from the loss of a parent and/or from the aggressive encounter with ICE agents.
  - ICE conducted raids in late December 2008 in Palm Beach, Broward and Miami-Dade counties. According to ICE reports, four alleged sex traffickers were arrested and nine trafficking victims were rescued. According to the Consulates of Mexico and Guatemala, however, the raid largely affected immigrants completely unrelated to the sex trafficking investigation. 42 Mexicans and 35 Guatemalans were detained in the raids, not counting persons of other national origins – far more than the 13 persons reported by ICE. Residents of Homestead report that these raids, meant to protect victims of trafficking, instead victimized many in the Homestead community and created a climate of fear and mistrust: ICE agents executed search warrants without giving residents a chance to open doors, entering with great force and destroying property; ICE agents used racial profiling to detain incidental neighbors and bystanders; ICE agents physically assaulted incidental individuals; ICE agents threatened harm on incidental persons by pointing guns at their heads, even with children present; ICE obtained warrants on the spot from the magistrate judge to enter homes without any indication of whom or what they were looking for on the premises; ICE did not afford any of the detained an opportunity to call the consulate of their country of citizenship; and ICE deported individuals without returning to them the money or property they confiscated from them. *Correspondence from the Florida Immigrant Coalition.*

### **Large-scale worksite enforcement actions**

- An 8 year-old girl used to be very quiet and very independent. Now she is with her mother wherever she goes -- bathroom, kitchen etc. Her aunt was taken away in the raid. The girl thinks the aunt has disappeared because she was not there to protect her. She sleeps in the same bed with Mom and says, "Hold me tight and don't move." She has nightmares. She won't go to school. She hides in bathroom when someone knocks because she thinks it's the "Migra" coming to take them. She plays with friends only if Mom is there. She complains about her stomach and chest hurting. She can't understand why her relatives are missing. She refuses to return to school. Sometimes she gets very mad and throws things. She is very rebellious. *Results of Interviews Conducted in Postville, Iowa, June 30, 2008 - July 30, 2008, Issues of Mental Health After the ICE Raid on Agriprocessor, Virginia Gibbs, Professor of Spanish, Luther College.*
- An 8 year-old-boy doesn't want to go to school since Mom is at home. He doesn't want to get up in the morning. He sleeps a lot. He eats well - more than before. He talks about the "migra" a lot - tells his Dad to be careful so he doesn't get taken by "la migra." He doesn't want to return to Mexico with Mom if she is deported. There is much drug



trafficking in their town, and one little girl was recently killed so he is afraid that might happen to him. *Results of Interviews Conducted in Postville, Iowa, June 30, 2008 - July 30, 2008, Issues of Mental Health After the ICE Raid on Agriprocessor, Virginia Gibbs, Professor of Spanish, Luther College.*

### **Immigration Detention Facilities- Application of the detention standards to all facilities housing ICE detainees**

- Five mothers with five young children were apprehended by the Border Patrol as they crossed the desert. They were not given food or water in the desert, on the bus, or in the processing center. Additionally, they were not examined for medical needs despite having spent three days in the desert and having young children with them. *"Crossing the Line: Human Rights Abuses of Migrants in Short-Term Custody on the Arizona/Sonora Border," No More Deaths, September 2008, available at [http://www.nomoredeaths.org/index.php?option=com\\_content&view=category&layout=blog&id=14&Itemid=20](http://www.nomoredeaths.org/index.php?option=com_content&view=category&layout=blog&id=14&Itemid=20)*
- ICE uses beds "rented" from private psychiatric hospitals for detention purposes- a use that raises a host of due process concerns. For instance, persons held in these beds are often categorically denied family visits and telephone access. This is also a barrier to seeking counsel. Moreover, these hospitals do not confirm the presence of ICE detainees, which makes it difficult for family / prospective counsel to locate / contact them. Involuntary commitment on the basis of a mental disability, forcible administration of medication, and the use of restraint and seclusion all raise significant due process concerns. Anecdotal accounts indicate that ICE engages in these practices in these settings with little to no oversight and in ways that violate due process. Of perhaps even greater concern is the lack of oversight regarding how long a person detained by ICE can be kept in these facilities. In the immigration context, no such protections seem to exist regarding the limitations on immigration detention if restoration to competency is unlikely. One individual was detained at San Pedro in late 2005 and the Immigration Judge refused to go forward until ICE produced a competency evaluation. ICE asked for administrative closure for purposes of obtaining such an evaluation. The evaluation was never produced, and the client spent the next nearly 2 years bouncing from one ICE-contracted psychiatric hospital to the next, without any follow-up or monitoring. It is unclear how widespread such situations are. But anecdotal accounts of such situations from advocates working on these issues seem to be on the rise. *Correspondence from Mental Health Advocacy Services, Inc.*
- Imeldo, age 21, was sexually harassed while in Border Patrol custody. After five days walking in the desert, she was held for two days by the Border Patrol; during this time, a man dressed in civilian clothing asked her to lift her blouse. She was also forced to lie on the floor of her cell. *"Crossing the Line: Human Rights Abuses of Migrants in Short-Term Custody on the Arizona/Sonora Border," No More Deaths, September 2008, available at [http://www.nomoredeaths.org/index.php?option=com\\_content&view=category&layout=blog&id=14&Itemid=20](http://www.nomoredeaths.org/index.php?option=com_content&view=category&layout=blog&id=14&Itemid=20)*



## **Immigration Detention Facilities- How the detention standards address concerns associated with the treatment of families and unaccompanied children**

- In Virginia, all ICE detainees are held in county jails that prohibit communication between persons in custody. If members of a family are taken into ICE custody and held in separate county jails, they can communicate through written letters, assuming they are both literate. However, if family members are placed in ICE custody at the same facility, they are prohibited from communicating pursuant to jail rules intended to prohibit fraternization between inmates. This communication barrier is especially damaging when parents in ICE custody are seeking to arrange care for children who are not in detention. *Correspondence from Vanessa Allyn, Capital Area Immigrants' Rights Coalition, February 2009.*
- Miguel is a 15 year-old indigenous boy from Guatemala who speaks limited Spanish. He was interviewed to determine whether he was eligible to apply for political asylum by an ICE official who did not speak Spanish. He asked his case worker at the shelter to write on his deportation paperwork that he wanted to see a judge. Instead of seeing the judge, Miguel was deported several days later. *Written testimony of Kara Hartzler, Esq. Florence Immigrant & Refugee Rights Project, U.S. House of Representatives Subcommittee on Immigration, February 13, 2008, available at [http://www.bc.edu/centers/humanrights/meta-elements/pdf/Kara\\_Hartzler\\_-\\_written\\_testimony.pdf](http://www.bc.edu/centers/humanrights/meta-elements/pdf/Kara_Hartzler_-_written_testimony.pdf)*
- Gabriela crossed the border with her mother, but after their arrest, they were detained at facilities sixty miles apart with no ability to communicate. Gabriela informed a Florence Project attorney that she wished to apply for political asylum; however, her mother had already signed paperwork accepting deportation for them both. They were eventually deported together and Gabriela had no opportunity to apply for asylum. *Written testimony of Kara Hartzler, Esq. Florence Immigrant & Refugee Rights Project, U.S. House of Representatives Subcommittee on Immigration, February 13, 2008, available at [http://www.bc.edu/centers/humanrights/meta-elements/pdf/Kara\\_Hartzler\\_-\\_written\\_testimony.pdf](http://www.bc.edu/centers/humanrights/meta-elements/pdf/Kara_Hartzler_-_written_testimony.pdf)*
- Chen Jiang arrived in the U.S. from Canada in 1994. He worked under substandard conditions in a New York factory and believed that his employers had obtained legal immigration status for him, but they had not. Chen married a U.S. citizen with whom he has two children and started a successful restaurant. One day, immigration officials came to his home and arrested him. At the time of the interview, Chen had been detained for fifteen months. His house and car had been taken by the bank and his restaurant closed. His wife and children survive on savings. Chen has never seen his youngest child, who was born after he entered detention, and he cries at night thinking about the struggles of his wife and children. *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington, Seattle University School of Law International Human Rights Clinic and OneAmerica, June 2008, available at <http://www.hatefreezone.org/downloads/Detention%20Center%20Study.pdf>*
- Ricardo Jiminez, a legal permanent resident, arrived in Los Angeles from El Salvador in 1982. He was convicted of a felony and served prison time in 1996. In 2005, ICE



arrested him at his home and transferred him to detention at the Northwest Detention Center in Tacoma, Washington. Ricardo has a wife and two children, ages 6 and 4, all of whom are U.S. citizens. His daughter has a debilitating illness and his wife struggles to care for the family and finances in his absence. Ricardo is not allowed contact visits. “I want to hold her, hug her. It’s hard on her, hard on me, but all I can do is see her through the glass.” The visits to the detention center have also traumatized the children. The guards have intimidated them, by yelling or trying to discipline them. Ricardo’s wife worries about the conditions of the visiting room, which she describes as extremely dirty and problematic for their ill daughter. Finally, the visitation rules change frequently, making it difficult for family to arrange visits. *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington, Seattle University School of Law International Human Rights Clinic and One America, June 2008, available at*

<http://www.hatefreezone.org/downloads/Detention%20Center%20Study.pdf>

- For most detainees in Arizona, the Detention Standards provisions for family visitation are moot because they have been transported to facilities far from their home communities. One woman from Florida stated that her family could not afford to travel to the detention center in Arizona by plane and that traveling by bus would require too many days off work. Several women reported that their families were too scared to enter the facility because they did not have immigration papers. “*Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*,” University of Arizona, January 2009, available at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>
- L was in immigration detention after her abusive husband reported her to ICE. He visited her in detention to inform her he was taking their two young U.S. citizen children with him to Mexico. Despite his history of abusive behavior and her constant efforts, L was unable to communicate with Child Protective Services or any other government entity to help her remove the children from his care. At the time of her interview, she had been unable to communicate with her children for the entire eight months of her detention. “*Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*,” University of Arizona, January 2009, available at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>
- Angela and Raquel, sisters from a South American country, were detained by ICE during a regular parole visit – two years prior they had agreed to serve as government informants in exchange for early release on a drug offense related sentence. They had lived in Florida as legal permanent residents since they were 10 and 16 years old. Each has two U.S. citizen children, ages 12 to 20 years, all living in Florida. They were transferred to Arizona without notice or opportunity to call their family. Their entire family then moved into a one room apartment in Florida to afford an attorney. Angela and Raquel fear torture in their home country since acting as informants in drug lord prosecutions and were granted relief under the Convention Against Torture. ICE appealed the grant and they are ineligible for bond because of their prior felony convictions. While the appeal was pending, their separation placed a great stain on their family, especially because even phone calls were expensive. They once went 20 days without speaking to their children. The family also could not afford an attorney for the appeal, and no brief was filed on their



behalf. After losing the appeal, Angela and Raquel waived further appeal. They were unable to bear more time in detention and were deported after nearly 10 months in detention in Arizona. *"Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona," University of Arizona, January 2009, available at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>*

- Sarah Roberts, a registered nurse from Tucson, Arizona states that "I have spoken with hundreds of migrants who were separated from their family members and repatriated at different times." *"Crossing the Line: Human Rights Abuses of Migrants in Short-Term Custody on the Arizona/Sonora Border," No More Deaths, September 2008, available at [http://www.nomoredeaths.org/index.php?option=com\\_content&view=category&layout=blog&id=14&Itemid=20](http://www.nomoredeaths.org/index.php?option=com_content&view=category&layout=blog&id=14&Itemid=20)*
- There is currently a minor detained by ICE in Phoenix who is now under the care of a contract shelter through the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services. The minor is a US Citizen with substantial evidence, including a US birth certificate, to support this claim. This evidence has been presented to ICE, but the minor has not yet had his proceedings terminated or been released. He has been in custody over a month. *Correspondence with the Florence Immigrant and Refugee Rights Project, February 2009.*
- Luz is an undocumented woman from Honduras who was detained by ICE with her 15 year old son after she went to pick him up from immigration custody. She left her one year old U.S. citizen child with her neighbor, thinking she would only be away for one day. Luz was unable to see or communicate with her child while she was detained at the Berks family detention center for over one year. Luz and her son lost their appeal and were scheduled to be deported. Luz desperately wanted to take her one year old U.S. citizen child with her but was unable to do so because she had no travel documents for the child, and no money to pay for the child's transport. Luz was deported and has had no contact with her child since her original detention.
- Efrain was stopped by the Border Patrol with his sister, Rosa, age 16. In custody, they were separated, even though Efrain and Rosa insisted that they were family. After being in custody for almost two days, Efrain was repatriated but denied any information about the whereabouts of his sister. It is unclear if she was taken to Nogales, remained in custody, was selected for prosecution, or was put in the care of the Consulate. It is likely they were repatriated through different ports of entry, as Efrain reported traveling a long distance before being repatriated. *"Crossing the Line: Human Rights Abuses of Migrants in Short-Term Custody on the Arizona/Sonora Border," No More Deaths, September 2008, available at [http://www.nomoredeaths.org/index.php?option=com\\_content&view=category&layout=blog&id=14&Itemid=20](http://www.nomoredeaths.org/index.php?option=com_content&view=category&layout=blog&id=14&Itemid=20)*

#### **Immigration Detention Facilities- Arrangements for monitoring compliance with the detention standards, and corrective actions or sanctions in the case of violation or shortfall**

- ICE stated in response to a Freedom of Information Act request seeking training materials or guidelines for local facilities housing ICE detainees that "ICE does not



provide manuals, handbooks, guidelines or instructional material to employees at any detention facility housing ICE detainees in Massachusetts.” *Detention and Deportation in the Age of ICE, Immigrants and Human Rights in Massachusetts, ACLU of Massachusetts, December 2008, available at*

[http://www.aclum.org/ice/documents/aclu\\_ice\\_detention\\_report.pdf](http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf)

- In late 2007, all ICE agents in the Boston district who were once stationed at local jails were moved to Burlington, resulting in no permanent presence of ICE personnel at jails to monitor conditions or communicate with detainees. *Detention and Deportation in the Age of ICE, Immigrants and Human Rights in Massachusetts, ACLU of Massachusetts, December 2008, available at*  
[http://www.aclum.org/ice/documents/aclu\\_ice\\_detention\\_report.pdf](http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf)
- Direct legal service providers who serve immigrant detainees in Pennsylvania have seen no efforts to comply with the detention standards or monitor compliance. *Correspondence from the Pennsylvania Immigration Resource Center, February 2009.*
- The detention standards are not taken seriously in Minnesota. Maria Inamagua lost her life in April 2006 in the Ramsey County Jail. This jail does not give medical care when detainees ask for it, and detainees are left unsupervised all night long. When someone falls off their bunk in the middle of the night, no one helps them till the next morning. Surprisingly, investigations by the County, State, and DHS inconclusively found that Ms. Inamagua would have passed away due to an existing medical condition and did not address the underlying violations. Legal service providers were subsequently allowed inside Ramsey County Jail to give detainees a presentation about the new detention standards, but were told by detainees that the facility fails to comply with any of the standards. For example, there is no access to anything resembling a computer or library—only a cart of old romance novels, no outdoor exercise, no health screening, no help for non-English speakers—especially those who speak a language other than Spanish, and detainees are locked in alone overnight. *Correspondence with immigration attorney in Minnesota, February 2009; Department of Homeland Security, Office of Inspector General, ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities (released June 2008),*  
[http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_08-52\\_Jun08.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_08-52_Jun08.pdf)
- Detainees repeatedly report inadequate access to meaningful grievance procedures and lack of review of detainee complaints. A DHS Office of Inspector General investigation into detention conditions at 5 ICE facilities found a lack of proper record keeping for detainee complaints. For example, there was no log of complaints or accessible complaint box for detainees to file anonymous grievances. Striking among the OIG’s findings were numerous instances of non-compliance with the detention standards that were not reported in the most recent ICE annual inspections of the 5 detention facilities. *Department of Homeland Security, Office of Inspector General, Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities (released Jan. 16, 2007),* [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_07-01\\_Dec06.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-01_Dec06.pdf)



### **Immigration Detention Facilities- Segregation from those with a serious criminal record**

- Yorro Kuyateh was tortured in his native Gambia as a gay political dissident and fled to the United States. He was detained for eight months while his asylum case was pending. While in a county detention facility in Missouri, he was placed in the general population, where he endured constant physical, verbal and sexual abuse from other inmates, many of whom had been convicted of violent crimes. Pleas for a transfer to a safe location went unanswered. Eventually, a criminal inmate charged with murder viciously beat Yorro, causing permanent brain damage. Yorro's cooperation in the prosecution resulted in an additional seven-year sentence for his assailant. In September 2005, Yorro was granted interim relief under the U visa. "*Maryland Man Fights Deportation to Gambia*," *Washington Blade*, Adrian Brune, August 20, 2004, available at <http://www.washblade.com/2004/8-20/news/localnews/mdman.cfm?page=1>; "*After Years of Trauma in the Immigration Court Bureaucracy, Yorro – a Gay Immigrant and Asylum-Seeker – Is Free of the Threat of Imminent Deportation*," *Equitas*, Holland & Knight, *The Year in Pro Bono*, December 2006, volume 5, issue 1, available at [www.hklaw.com/File.aspx?id=9](http://www.hklaw.com/File.aspx?id=9)
- One detainee called the mixing of populations a "ticking time bomb" because it is inevitable that something will happen to one of the ICE detainees. ICE detainees report that federal marshal prisoners are treated better by guards because they can speak English, particularly in terms of services, jobs, clothing and sleeping arrangements. A perceived imbalance of power exists between federal marshal prisoners, who may be facing long sentences and have little to lose by aggressive behavior, and ICE detainees who do not know when they will be released and are unfamiliar with prison culture. "*Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona*," University of Arizona, January 2009, available at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>

### **Immigration Detention Facilities- Expanding the use of community-based alternatives to detention or of less-restrictive models of detention**

- In 2007, the National Immigrant Justice Center provided assistance to a detained African immigrant who had infectious tuberculosis and HIV. ICE released him on an order of supervision after they discovered he was HIV+. He was later diagnosed with AIDS. Despite a filed Stay of Removal and notification to senior ICE officials, he was put on a plane to Africa, potentially exposing other passengers to tuberculosis. *Written Testimony of Mary Meg McCarthy, Executive Director, National Immigrant Justice Center, Before the U.S. House of Representatives Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security & International Law, Hearing on Problems with Immigration Detainee Medical Care, June 4, 2008*, available at <http://judiciary.house.gov/hearings/pdf/McCarthy080604.pdf>
- A Haitian woman fled to the US-Mexico border after being kidnapped and targeted by violent gangs due to her political activities. She arrived at the San Diego port of entry and was immediately detained and sent to the Otay Mesa facility. There, she became depressed and cried nearly every day. Eventually, she obtained pro bono representation and requested to be released on parole. She was detained for eight and a half month before finally being released and allowed to join her sister – a U.S. citizen – in New

York. Her asylum case is still pending in New York. *Excerpt of interview conducted by Human Rights First attorney.*

- A Somali woman was detained for nearly five months at the T. Don Hutto Family Detention Center in Texas while her asylum case was pending. When she was detained at the border she was handcuffed: “I started crying, and saying I’m not a criminal, I didn’t do anything bad. I couldn’t understand why they were doing it.” She was finally released after she was granted asylum. *Excerpt of interview conducted by Human Rights First attorney.*
- A Burundi refugee was detained after presenting himself at the border and asking for asylum. He and his family had been targeted by rebels who believed his father was informing the government on rebel activities. “When they took us, they brought us to the detention center, and they handcuffed us. And we were like: We didn’t do anything wrong. We just came to ask refuge, and why did you take us here.” He was detained at the Port Isabel Processing Center for four and a half months. *Excerpt of interview conducted by Human Rights First attorney.*
- Sarjina Emy and her brother Shamsul (Sam) Rana were 19 and 26 years-old when ICE detained them along with their entire family. They have been detained for over 20 months. Sarjina and Sam were brought to the U.S. when they were very young by their asylum-seeking parents. When their father’s claim was denied, the court also entered final deportation orders to Sarjina and Sam even though they did not apply for asylum and were both minors at the time. Today, but for the 2002 orders of removal, both Sarjina and Sam, now married to a U.S. citizen, would be eligible for U.S. permanent residency based on an approved petition by an employer and familial relations. Because ICE refuses to release them from detention on ankle bracelets, their father’s final order of removal has kept them imprisoned for nearly two years. Sarjina and Sam themselves have been exemplary residents with a perfect background. Their family paid taxes, started a business, and the children went to school. They also have strong family and community ties and enjoy widespread support. *Letter from the Florida Immigrant Coalition to the Office of Congressman Mario Diaz-Balart, February 2, 2009.*

#### **Electronic Travel Documents**

- ICE is non-compliant with regulations governing the review of post-order cases. In March 2007, the Department of Homeland Security's Office of Inspector General (OIG) released a report reviewing ICE compliance with U.S. Supreme Court rulings on indefinite detention. The OIG found that ICE failed to provide detainees with prior notice of custody reviews, information about how they can cooperate in removal efforts, or decisions that clearly explain why supervised release has been denied. OIG attributed many of these failures to inadequate staffing at local ICE Field Office levels, and at the ICE Headquarters level, which leads to insufficient oversight of local custody decisions. *Department of Homeland Security, Office of Inspector General, ICE's Compliance With Detention Limits for Aliens With a Final Order of Removal From the United States (February 2007), [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_07-28\\_Feb07.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_07-28_Feb07.pdf)*



- A 26-year-old Palestinian, Mr. Y was born in Gaza and lived there until the age of 10, when his family moved to Libya. Mr. Y lived in a refugee camp in Libya for 14 years before fleeing to the United States to seek asylum. Upon reaching the United States, he was placed in the Elizabeth Detention Center in New Jersey. He appeared without a lawyer before an Immigration Judge, who denied him asylum in January 2001. Mr. Y had been in INS detention for 1 year following his final order of removal when a pro bono lawyer determined that removal would likely be impossible in his case, since he was a Palestinian lacking documents. Mr. Y sought his release on an Order of Supervision, and in the spring of 2002, when that avenue failed, pro bono counsel filed a *habeas corpus* petition on his behalf. More than two years later – at which point he had been imprisoned more than four years – the Court of Appeals for the Third Circuit ordered him released under conditions of supervision, until such time as a government is located that is willing to accept him. *Briefing Materials Submitted to the United Nations Special Rapporteur on the Human Rights of Migrants, Detention and Deportation Working Group*, available at [http://www.aclu.org/pdfs/humanrights/detention\\_deportation\\_briefing.pdf](http://www.aclu.org/pdfs/humanrights/detention_deportation_briefing.pdf)
- Of the 14 publicly available *habeas* petitions filed in federal court in Massachusetts in 2008, most immigrant petitioners were successful in compelling ICE to release them shortly after filing. ICE released 11 detainees and scheduled deportations for the remaining 3 within 1-4 months of the petition being filed. One detainee was told by his ICE deportation officer that even though ICE knew they would not be able to deport him, he had to stay in jail for six months. When he was released and then re-arrested, ICE officers said he would be in jail for 90 days and then released again, as if administrative immigration detention were a punitive sentence. *Detention and Deportation in the Age of ICE, Immigrants and Human Rights in Massachusetts, ACLU of Massachusetts, December 2008*, available at [http://www.aclum.org/ice/documents/aclu\\_ice\\_detention\\_report.pdf](http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf)
- Annette came to the United States fleeing violence in her native African country and married a U.S. citizen. In the United States, Annette received a master's degree in Rehabilitative Counseling and worked for years helping to rehabilitate veterans in a local government agency. When she applied for a green card, the government accused her of marriage fraud because her passport stated that she was already married in her country. Annette explained that she had become married to a man under their country's customary marriage practice, which is not legally binding until a second ceremony takes place. Their relationship had fallen apart before the second ceremony was conducted, so her "marriage" was never finalized. A Reverend from her country supported Annette's explanation of the legal practice. A judge found that this story was not credible and ordered her deported. ICE agents arrested Annette from her home and placed her in detention. Despite supporting letters from her employers, friends, and community members, she spent over one year in jail before she was deported. She did not receive any notice of a custody review and did not have any opportunity to submit evidence to support her release. She could have submitted evidence that she was neither a flight risk nor a danger to the community. For example: she had long-standing ties to her community; after 11 years, she was still married to the same U.S. citizen with whom she was accused of committing marriage fraud; she was currently in school and halfway through a second master's degree; she owned a home in Massachusetts; and she had no

criminal record. “*Detention and Deportation in the Age of ICE, Immigrants and Human Rights in Massachusetts*,” *ACLU of Massachusetts*, December 2008, available at [http://www.aclum.org/ice/documents/aclu\\_ice\\_detention\\_report.pdf](http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf):

- Charles came to the United States from Liberia. Six months and 22 days after ICE detained him and placed him in Plymouth, he received a custody review. The agency decided to continue his detention because he had been “convicted of a number of particularly serious crimes, including crimes of violence” and the agency believed that he was “a danger to the community and a severe flight risk.” The crime of violence to which the agency referred was a guilty plea to violating a restraining order his girlfriend had placed on him. To explain, his girlfriend wrote a letter to ICE in which she stated, “I ... put a restraining order on [Charles] because while we were dating I found out that [Charles] was seeing someone else. So I ... got mad and jealous so to get him back I put a restraining order on him because my feelings were hurt, not because of violence.” His next three custody reviews stated that he was being kept in detention because he had not complied with his obligation to help ICE obtain travel documents from Liberia. He explained to ICE several times that he had called the embassy and that they refused to recognize him as a Liberian national because his name was not a Liberian name. He was stuck in limbo, from which he began to believe he would never emerge. He spent over two years in jail until he filed a *habeas corpus* petition on his own, with the help of a law student and materials from a non-profit organization. “*Detention and Deportation in the Age of ICE, Immigrants and Human Rights in Massachusetts*,” *ACLU of Massachusetts*, December 2008, available at [http://www.aclum.org/ice/documents/aclu\\_ice\\_detention\\_report.pdf](http://www.aclum.org/ice/documents/aclu_ice_detention_report.pdf):

















































































































































































National Day Laborer Organizing Network  
Red Nacional de Jornaleros

675 S. Park View St., Ste B  
Los Angeles, CA 90067

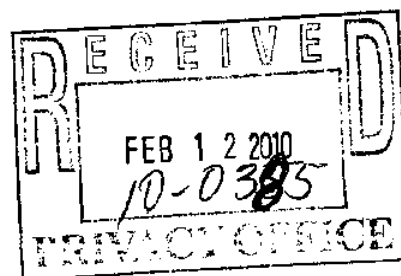
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February 3, 2010

The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Drive, S.W.  
STOP-0550  
Washington, DC 20528-0550  
Attn. Catherine M. Papoi, Deputy Chief FOIA Officer



Re: **Freedom of Information Act Request**

To Whom It May Concern:

This is a request under the Freedom of Information Act, 5 U.S.C. Sec. 552 ("FOIA"), on behalf of the National Day Laborer Organizing Network ("NDLON"), the Center for Constitutional Rights ("CCR"), and the Immigration Justice Clinic of the Benjamin N. Cardozo School of Law ("the Clinic") (collectively "the Requesters") for information regarding the U.S. Immigration and Customs Enforcement agency ("ICE") program Secure Communities ("Secure Communities"). We ask that you please direct this request to all appropriate offices and departments within the agency.

**Purpose of Request**

The purpose of this request is to obtain information for the public about the Secure Communities program and its impact on the relationship between local law enforcement and immigration enforcement in local communities. This information will enable the public to monitor the impact of the program. ICE announced the Secure Communities program in March 2008 as a program to facilitate the automatic sharing of fingerprints between federal immigration authorities and local and state enforcement agencies.<sup>1</sup> Secure Communities' purported objective is to "target" individuals who have committed crimes and "prioritize" removal of the most dangerous criminals. ICE has since implemented Secure Communities in over 95 jurisdictions and plans to expand it nationwide by 2013.<sup>2</sup> In spite of this unprecedented large-scale

<sup>1</sup> The program introduces automatic interoperability between FBI and immigration databases.

<sup>2</sup> David Sherfinski, *ICE plans expansion of immigration database program*, WASHINGTON EXAMINER, Jan. 28, 2010, available at <http://www.washingtonexaminer.com/local/ICE-plans-expansion-of-immigration-database-program-82809177.html#ixzz0ePOriSz2>.



cooperation between federal immigration authorities and state and local agencies, ICE has promulgated no regulations and released minimal information about the program's operation.

The sometimes contradictory materials that ICE has released leave significant gaps in the public's understanding of the program's purpose, procedures, and potential impact on local communities.<sup>3</sup> Information unavailable to the public includes, but is not limited to, ICE's policies, procedures, and training materials related to Secure Communities and the subsequent detention and removal of individuals identified by Secure Communities, agreements between ICE and state or local entities, and the projected fiscal impact of Secure Communities. No information clarifies whether ICE takes action to protect citizens from erroneous detention and removal, to identify and protect vulnerable groups, or prevent racial profiling in local communities. The minimal data released from jurisdictions where Secure Communities has been implemented indicates that ICE has not effectively prioritized the most dangerous criminals. It is also unclear the extent to which individuals identified by the Secure Communities process are experiencing due process violations and other abuses when they are swept through ICE's costly, dangerous, and inefficient detention and removal system.

#### **A. Definitions**

- 1) **Secure Communities Jurisdiction(s).** In this request, the term "Secure Communities Jurisdiction(s)" is defined as all jurisdictions where Secure Communities has been implemented.
- 2) **Potential Secure Communities Jurisdiction(s).** In this request, the term "Potential Secure Communities Jurisdiction(s)" is defined as all jurisdictions where ICE is negotiating the implementation of Secure Communities or is in the process of finalizing an agreement.
- 3) **Designated Jurisdiction(s).** In this request, the term "Designated Jurisdiction(s)" refers to the following jurisdictions:
  - Florida, all jurisdictions
  - Washington, D.C.
  - Harris County, TX
  - San Diego County, CA
  - Los Angeles County, CA
  - Maricopa County, AZ
  - Philadelphia County, PA
  - Wake County, NC
- 4) **Secure Communities Query.** In this request, the term "Secure Communities Query" is defined as a Criminal Answer Required ("CAR"), Criminal Print Identification ("CPI") File Maintenance Query, or any other mechanism by which a Law Enforcement Agency submits a fingerprint query to be run through the Secure Communities' system to be checked against FBI and any DHS databases.<sup>4</sup>

<sup>3</sup> See Secure Communities Standard Operating Procedures, §§ 2.1.1 – 2.1.4, available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf), attached at Tab A.

<sup>4</sup> Secure Communities Standard Operating Procedures, §§ 2.1.1 – 2.1.4, available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf), attached at Tab A.

- 5) **Secure Communities Match.** In this request, the term “Secure Communities Match” is defined as an interoperability hit following a Criminal Answer Required (“CAR”) or Criminal Print Identification (“CPI”) File Maintenance Query including, but not limited to, any instance in which a Secure Communities Query matches an individual to a record in any DHS database.
- 6) **Immigration Detainer.** In this request the term “Immigration Detainer” refers to the Form I-247, Immigration Detainer - Notice of Action (attached at Tab B) or any other similar request by ICE to detain an individual in state or local custody upon their release.
- 7) **ICE Field Offices.** In this request the term “ICE Field Offices” refers to all ICE Field Offices, including, but not limited to, ICE Sub-Field Offices, and any other ICE office involved in immigration enforcement.<sup>5</sup>
- 8) **Law Enforcement Agency.** In this request the term “Law Enforcement Agency” includes, but is not limited to, any state, city, county, or local police agency, department of corrections, sheriff’s office, jail, or other holding facility.
- 9) **Vulnerable Groups.** In this request the term Vulnerable Groups includes, but is not limited to, such groups as minor children, the elderly, pregnant or breastfeeding woman, individuals with chronic or acute medical or mental health conditions, victims of human trafficking or other crimes, individuals with T, U, or S visas or pending visa applications, individuals who express a fear of persecution if removed, and individuals with dependent minor children in the United States.
- 10) **Record(s).** In this request the term “Record(s)” includes, but is not limited to, all Records or communications preserved in electronic or written form, such as correspondences, emails, documents, data, videotapes, audio tapes, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, legal opinions, protocols, reports, rules, technical manuals, technical specifications, training manuals, studies, or any other Record of any kind.

## **B. Acronyms**<sup>6</sup>

|                                                                 |                 |
|-----------------------------------------------------------------|-----------------|
| Department of Justice                                           | DOJ             |
| Federal Bureau of Investigation                                 | FBI             |
| Criminal Justice Information Services                           | CJIS            |
| Integrated Automated Fingerprint Identification System          | IAFIS           |
| Department of Homeland Security                                 | DHS             |
| Immigration and Customs Enforcement                             | ICE             |
| United States Visitor and Immigrant Status Indicator Technology | US-VISIT        |
| Automated Biometric Identification System                       | IDENT           |
| State Identification Bureau                                     | SIB             |
| Memorandum of Agreement                                         | MOA             |
| Local Law Enforcement Agency                                    | Local LEA       |
| National Fingerprint File                                       | NFF             |
| Criminal Ten-Print Submission (Answer Required)                 | CAR transaction |

<sup>5</sup> Jacqueline Stevens, *America’s Secret ICE Castles*, THE NATION, Dec. 16, 2009, available at <http://www.thenation.com/doc/20100104/stevens>; List of Immigration and Customs Enforcement Subfield Offices, attached at Tab C.

<sup>6</sup> See also Appendix B, attached at Tab D.

|                                    |      |
|------------------------------------|------|
| National Crime Information Center  | NCIC |
| Automatic Immigration Alien Query  | IAQ  |
| ICE Law Enforcement Support Center | LESC |
| Immigration Alien Response         | IAR  |
| IDENT Data response                | IDR  |

### **C. Request for Information**

#### **1) Policies, Procedures and Objectives**

Any and all Records, received, maintained, or created by any government agency or subdivision, related to the policies, procedures or objectives of Secure Communities, including documents created prior to March 28, 2008. Such Records include but are not limited to:

- a. **Overview Documents:** policies, operating procedures, rules, internal policy guidance, training materials and legal opinions or memoranda referencing Secure Communities or discussing the mandate, goals, objectives, function responsibility, purpose, implementation, deployment strategy of Secure Communities and any procedures for state or local jurisdictions to opt-out of Secure Communities.
- b. **State and Local Agreements:** agreements, including Memoranda of Agreement, Memoranda of Understanding, and drafts of agreements between ICE and any partner, including State Identification Bureaus ("SIBs"), local Law Enforcement Agencies ("local LEAs") or other state or local agencies related to Secure Communities.
- c. **Secure Community's Inquiry & Response Procedures:** any and all Records related to policies and procedures governing the initiation of Secure Communities Queries in Secure Communities Jurisdictions and policies and procedures governing ICE's responses to Secure Communities Queries, including, but not limited to:
  - i. Any Record containing guidance or procedures governing when local LEAs may generate a Secure Communities Query, including any Records providing for mandatory Secure Communities Queries or discretionary Secure Communities Queries.
  - ii. Any Record related to any past, current, or future practice of automatic generation of a Secure Communities Query ("automated IAQ processing") when "unknown" or "other than the United States" is entered as an individual's place of birth.<sup>7</sup>
  - iii. Any Records that contain lists or otherwise identify any databases checked as a result of a Secure Communities Query, including, but not limited to, all national, state and local databases.
  - iv. Any Records containing standard notices or computer screen shots generated in response to a Secure Communities Query.

<sup>7</sup> Secure Communities Standard Operating Procedures, § 2.2.7, available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf), attached at Tab A.

- d. **Detainer Procedures:** any and all Records containing guidance, procedures, or standards governing the issuance or lifting of Form I-247, Immigration Detainer - Notice of Action ("Immigration Detainer"), by the Law Enforcement Support Center ("LESC"), the Criminal Alien Program ("CAP"), or ICE Field Offices on individuals who are subject to a Secure Communities Query, including any Records related to the Secure Communities "risk-based approach"<sup>8</sup> or the "Secure Communities' levels and offense categories" by National Crime Information Center ("NCIC") Code.<sup>9</sup>
- e. **State Training or Explanatory Materials:** any and all Records containing training, briefing, guidance, procedures, rules, or other informational materials developed for local LEAs, SIBs, or other state or local entities.
- f. **Relationship Between Secure Communities and Other ICE Enforcement Programs:** any and all Records indicating the interface or relationship between Secure Communities and other ICE programs, including but not limited to the Criminal Alien Program ("CAP"), 287(g) arrangements, and other ICE Agreements of Cooperation in Communities to Enhance Safety and Security ("ICE ACCESS").
- g. **Racial Profiling Policy:**
  - i. Any and all Records related to ICE monitoring or plans to monitor Secure Communities Jurisdictions for racial or ethnic profiling or other due process violations;<sup>10</sup>
  - ii. Any and all Records related to local LEAs' racial profiling or anti-racial profiling policies or procedures from Secure Communities Jurisdictions or Proposed Secure Communities Jurisdictions;
  - iii. Any and all Records evaluating, reviewing, compiling or otherwise discussing compliance with racial profiling or anti-racial profiling policies and procedures, including, but not limited to, Section 1.0 of the Secure Communities Standard Operating Procedures.
- h. **Vulnerable Groups:** Any and all Records containing policy or procedures concerning the treatment of Vulnerable Groups targeted by Secure Communities, including, but not limited to, the issuance of Immigration Detainers, parole, or other exercise of prosecutorial discretion.

<sup>8</sup> Secure Communities Fact Sheet, U.S. Department of Homeland Security, Immigration and Customs Enforcement, September 1, 2009, *available at* [www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities), attached at Tab E.

<sup>9</sup> Secure Communities Standard Operating Procedures, Appendix A, *available at* [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf), attached at Tab A.

<sup>10</sup> Secure Communities Standard Operating Procedures, Introduction, § 1.0, *available at* [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf), attached at Tab A (stating that "[u]se of IDENT/IAFIS for the purpose of racial and/or ethnic profiling or other activity in violation of the Fourth Amendment of the United States Constitution is not permitted and may result in the suspension of the local jurisdiction engaged in the improper activity").

## 2) Data & Statistical Information

Any and all Records, excluding Records from individual Alien files, containing data or statistics prepared, compiled, or maintained by ICE or any agency or subdivision thereof related to or pertaining to Secure Communities or to Secure Communities Jurisdictions beginning the last full fiscal year prior to the implementation of Secure Communities in each jurisdiction through the present (except as otherwise specified). Such Records should include, but not be limited to:

- a. **Criminal Answer Required (“CAR”) and Criminal Print Identification (“CPI”) File Maintenance Messages:** Records that contain data or statistical information on CARs and CPI File Maintenance Messages originating in each Secure Communities Jurisdiction and cumulatively (including Records that contain data or statistical information on of any and all fingerprints transmitted through interoperability), from the implementation of Secure Communities through the present, or any sub-period thereof. Any Records that contain statistics or data drawn from such CARs and CPIs, including any analysis or breakdown thereof.
- b. **Automatic Immigration Alien Queries (“IAQs”):** Records that contain data or statistical information on IAQs triggered by inquiries from each Secure Communities Jurisdiction (including Records that contain data or statistical information on any and all matches or hits in IDENT), from the implementation of Secure Communities through the present, or any sub-period thereof. Any Records that contain data drawn from such IAQs, including any analysis or breakdown thereof.
- c. **Immigrant Alien Responses (“IARs”) and IDENT Data Responses (“IDRs”):** Records that contain data or statistical information on IARs and IDRs triggered by Secure Communities Queries from each Secure Communities Jurisdiction, from the implementation of Secure Communities through the present, or any sub-period thereof. Any Records that contain data drawn from such IARs and IDRs, including any analysis or breakdown thereof.
- d. **Form I-247, Immigration Detainers (Immigration Detainers):**
  - i. **Pre-Secure Communities:** Records that contain data or statistical information on the number of Immigration Detainers lodged dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
  - ii. **Pre-Secure Communities through CAP:** Records that contain data or statistical information on the number of Immigration Detainers lodged through the Criminal Alien Program dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
  - iii. **Post-Secure Communities:** Records that contain data or statistical information on the number of Immigration Detainers lodged in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
  - iv. **Post-Secure Communities through CAP:** Records that contain data or statistical information on the number of Immigration Detainers lodged through the Criminal

Alien Program in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;

- v. **Secure Communities Detainers:** Records that contain data or statistical information on the number of Immigration Detainers lodged on individuals who are subject to a Secure Communities Query in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- vi. Any Records that contain data drawn from any such Immigration Detainer forms, including any analysis or breakdown thereof.

e. **Form I-213, Record of Deportable/Inadmissible Alien:**

- i. **Pre-Secure Communities:** Records that contain data or statistical information on the number of Forms I-213 issued dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- ii. **Pre-Secure Communities through CAP:** Records that contain data or statistical information on the number of Forms I-213 issued through the Criminal Alien Program dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- iii. **Post-Secure Communities:** Records that contain data or statistical information on the number of Forms I-213 issued in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- iv. **Post-Secure Communities through CAP:** Records that contain data or statistical information on the number of Forms I-213 issued through the Criminal Alien Program in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- v. **Secure Communities I-213s:** Records that contain data or statistical information on the number of Forms I-213 issued on individuals who are subject to a Secure Communities Query in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- vi. Any Records that contain data drawn from any such I-213 forms, including any analysis or breakdown thereof.

f. **Form I-286, Notice of Custody Determinations:**

- i. **Pre-Secure Communities:** Records that contain data or statistical information on the number of Forms I-286 issued dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- ii. **Pre-Secure Communities through CAP:** Records that contain data or statistical information on the number Forms I-286 issued through the Criminal Alien Program dating back through the last full fiscal year prior to the implementation

of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;

- iii. **Post-Secure Communities:** Records that contain data or statistical information on the number of Forms I-286 issued in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- iv. **Post-Secure Communities through CAP:** Records that contain data or statistical information on the number of Forms I-286 issued through the Criminal Alien Program in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- v. **Secure Communities I-286:** Records that contain data or statistical information on the number of Forms I-286 issued on individuals who are subject to a Secure Communities Query in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- vi. Any Records that contain data drawn from any such I-286 forms, including any analysis or breakdown thereof.

g. **Form I-862, Notice to Appears (NTA):**

- i. **Pre-Secure Communities:** Records that contain data or statistical information on the number of Forms I-862 issued dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- ii. **Pre-Secure Communities through CAP:** Records that contain data or statistical information on the number of Forms I-862 issued through the Criminal Alien Program dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- iii. **Post-Secure Communities:** Records that contain data or statistical information on the number of Forms I-862 issued in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- iv. **Post-Secure Communities through CAP:** Records that contain data or statistical information on the number of Forms I-862 issued through the Criminal Alien Program in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- v. **Secure Communities I-862:** Records that contain data or statistical information on the number of Forms I-862 issued on individuals who are subject to a Secure Communities Query in each Secure Communities Jurisdiction and cumulatively, from the implementation of Secure Communities through the present, or any sub-period thereof;
- vi. Any Records that contain data drawn from any such I-862 forms including any analysis or breakdown thereof.

**h. Criminal Records in Secure Communities Jurisdictions:**

- i. **Pre-Secure Communities:** Records that contain data or statistical information on criminal history or records and/or pending charges of individuals identified through the Criminal Alien Program dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- ii. **Post-Secure Communities:** Records that contain data or statistical information on criminal history or records and/or pending charges of individuals who are subject to a Secure Communities Query in each Secure Communities Jurisdiction and cumulatively, since the implementation of Secure Communities;
- iii. Any Records that contain any analysis or breakdown of the aforementioned data and statistical information on criminal history, records, or pending charges.

**i. Offense Level Determinations:**

Any records that contain data or statistical information disaggregated by any categorization of criminal history or other risk-based assessment including, but not limited to, the "Secure Communities' levels and offense categories"<sup>11</sup> for the following periods:

- i. **Pre-Secure Communities:** Dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively; and
- ii. **Post-Secure Communities:** Since the implementation of Secure Communities.

This request includes any such record pertaining to whether or not detainers were lodged, whether or not Notices to Appear were issued, and whether or not individuals were ordered removed and/or actually removed.

**j. Removals:**

Any records that contain data or statistical information on removals of individuals in Secure Communities jurisdictions, including:

- i. **Pre-Secure Communities:** Any removal resulting from apprehensions through the CAP dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- ii. **Post-Secure Communities:** Any removal of individuals who are subject to a Secure Communities Query since the implementation of Secure Communities, in each Secure Communities Jurisdiction and cumulatively;
- iii. **Post-Secure Communities through CAP:** Any removal resulting from apprehensions through the CAP following the implementation of Secure Communities, in each Secure Communities Jurisdiction and cumulatively.

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<sup>11</sup> See Secure Communities Standard Operating Procedures, Appendix A, available at [http://www.icc.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.icc.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf), attached at Tab A.



k. **United States Citizens:**

Any records that contain data or statistical information or any discussion or information whatsoever pertaining to United States Citizens:

- i. Identified through Secure Communities Matches;
- ii. Subjected to Immigration Detainers after being subject to a Secure Communities Query;
- iii. Detained by ICE after being subject to a Secure Communities Query;
- iv. Removed by ICE after being subject to a Secure Communities Query.

l. **Demographic Data**

Any records that contain data or statistical information on race, ethnicity, sex, age, or place of birth of:

- i. Subjects of Detainers
  1. **Pre-Secure Communities:** Individuals subject to detainers dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
  2. **Post-Secure Communities:** Individuals subject to detainers after being subject to a Secure Communities Query since the implementation of Secure Communities, in each Secure Communities Jurisdiction and cumulatively;
- ii. Subjects of Secure Communities Queries;
- iii. Subjects of Secure Communities Matches.

m. **Vulnerable Groups**

Any and all Records containing data or statistical information on Vulnerable Groups for:

- iv. **Pre-Secure Communities:** Individuals subject to detainers dating back through the last full fiscal year prior to the implementation of Secure Communities, or any sub-period thereof, in each Secure Communities Jurisdiction and cumulatively;
- v. **Post-Secure Communities:** Individuals subject to Secure Communities Queries since the implementation of Secure Communities, in each Secure Communities Jurisdiction and cumulatively;

3) **Individual Records**

The following Records pertaining to individuals subject to Secure Communities Queries or ICE detainers in Designated Jurisdictions from October 2007 through the present:

- i. Criminal Answer Required (CAR) and Criminal Print Identification (CPI) File Maintenance Messages;
- ii. Automatic Immigration Alien Queries (IAQs);
- iii. Immigrant Alien Responses (IAR) and IDENT Data Responses (IDR);

- iv. Form I-247, Immigration Detainer – Notice of Action (Immigration Detainer);
- v. Form I-213, Record of Deportable/Inadmissible Alien;
- vi. Form I-215c, Record of Sworn Statement in Affidavit Form;
- vii. Form I-200, Warrant for Arrest of Alien;
- viii. Stipulated Request for Final Order of Removal and Waiver of Hearing;<sup>12</sup>
- ix. Written Notice of Reinstatement of Removal;<sup>13</sup>
- x. Administrative Voluntary Departure;
- xi. Form I-851, Notice of Intent to Issue a Final Administrative Deportation Order (Notice of Intent)
- xii. Form I-205, Warrant of Removal
- xiii. Form I-286, Notice of Custody Determination;
- xiv. Form I-862, Notice to Appear (NTA);
- xv. Initial Notice of Hearing in Removal Proceedings;
- xvi. Immigration Judge Bond Redetermination Order, EOIR Form 1;
- xvii. Notice of Entry of Appearance as Attorney or Representative before the Immigration Court, Form EOIR-28 or USCIS Form G-28;
- xviii. Notice of Entry of Appearance as Attorney or Representative before the Board of Immigration Appeals, Form EOIR-27
- xix. Immigration Judge Orders: ordering individual removed, terminating proceedings, or granting relief;
- xx. Any other Records that contain any of the following information:
  - i. **Demographic Information:**
    - 1. The criminal history of, and the current charges against, the individual;
    - 2. The individual's age, race, gender, nationality, place of birth or status as a member of a Vulnerable Group.

<sup>12</sup> See Stipulated Request for Final Order of Removal and Waiver of Hearing, <http://www.scribd.com/doc/22093836/EOIR-Stipulated-Request-for-Removal-Order-and-Waiver-of-Hearing>

<sup>13</sup> See 8 C.F.R. § 1241.8(b)

ii. **Immigration Detainers:**

1. Whether the Immigration Detainer was lodged on individuals who are subject to a Secure Communities Query;
2. Whether the Immigration Detainer was issued by the LESC, the CAP, a local ICE field office, a 287(g) officer, or some other entity;
3. How the determination to lodge an Immigration Detainer was made, including reference to any policy guidelines or "risk-based" assessment, such as guidance based on criminal history or factors such as age, gender, medical or mental health conditions, or dependent minor children;
4. For any individual identified following a Secure Communities Query for whom an Immigration Detainer was not lodged or was subsequently lifted and the reasons for that determination, including reference to any policy guidelines or "risk-based" assessment.

iii. **ICE Custody Determinations:**

1. Any notice or communication from the local or state facility with custody of the individual subject to an ICE detainer to ICE indicating when the individual is to be released from criminal custody or when ICE can and/or must assume custody;
2. The date and time the individual subject to the detainer was taken into ICE custody;
3. Whether and when the individual posted bond, if any;
4. What factors ICE considered in deciding whether or not to issue bond, how much bond to issue, whether to release someone on their own recognizance, whether to put someone on supervised release or intensive supervised release, whether to grant someone parole or prosecutorial discretion, or any other custody determination, including, for example, any worksheet or checklists utilized for any of the above determinations and reference to any policy guidelines or "risk-based" assessment, including, but not limited to, determinations based on:
  - I. Any categorization of criminal history or other risk-based assessment including, but not limited to, the "Secure Communities' levels and offense categories";<sup>14</sup>
  - II. Age or gender;
  - III. Medical or mental health conditions;
  - IV. Eligibility for T, U, S visas, or VAWA adjustment;
  - V. Eligibility for asylum, withholding or protection under the Convention Against Torture;
  - VI. Eligibility for other forms of relief from removal;
  - VII. Length of permanent residence in the United States and community ties; or
  - VIII. The existence of minor children dependent on the individual or other family members in the United States;

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<sup>14</sup> See Secure Communities Standard Operating Procedures, Appendix A, available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf), attached at Tab A.

5. Whether the individual's criminal case(s) were resolved at the time ICE assumed custody.

iv. **Immigration Charging Document:**

1. When a Notice to Appear is not issued after ICE assumes custody, whether the non-issuance is due to:
  - I. The existence of a prior deportation, exclusion, or removal order;
  - II. The existence of a stipulated order of removal;
  - III. The issuance of a Form I-851, Notice of Intent to Issue a Final Administrative Deportation Order, pursuant to the expedited removal statute;
  - IV. The issuance of a Final Administrative Order of Removal;
  - V. The issuance of a Form I-860, Notice and Order of Expedited Removal, pursuant to the expedited removal statute;
  - VI. ICE's determination that the individual is a United States citizen;
  - VII. ICE's determination that the individual is not removable;
  - VIII. ICE's exercise of prosecutorial discretion; or
  - IX. Any other factor.
2. The date and time that ICE:
  - I. Executed the Notice to Appear;
  - II. Served the Notice to Appear on the individual;
  - III. Filed the Notice to Appear with the Executive Office for Immigration Review.

v. **Immigration Bonds:**

1. Whether and when the individual requested a bond hearing;
2. Whether and when a bond hearing was held;
3. Whether and when an individual requested a redetermination of custody decision;
4. Whether and when a custody redetermination hearing was scheduled;
5. Whether and when a custody redetermination hearing was held;
6. Whether and when the individual requested a *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), hearing;
7. Whether and when a *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), hearing was held;
8. The amount of the bond set by the Immigration Judge, if any;
9. Whether the individual appealed the bond determination;
10. Whether and when the individual posted bond, if any.

vi. **Removal Proceedings:**

1. If resolved, the final outcome of the individual's removal case;
2. If pending, the current status of the individual's removal case;
3. The date the individual's removal case was resolved;
4. Whether the individual was represented by counsel in the removal proceeding at any time.

vii. **Detention:**

1. When the individual was first detained by ICE;
2. If released, the date the individual was released from custody (or removed);
3. Each location and facility where the individual was detained and the dates of detention at each such facility.

4) **Fiscal Impact of Secure Communities**

- a. **Fiscal Impact on State and Local Secure Communities Jurisdictions and Potential Secure Communities Jurisdictions:** Any and all Records related to the fiscal impact or the actual, estimated, or projected cost on state and local Secure Communities Jurisdictions and Proposed Secure Communities Jurisdictions arising from or related to Secure Communities or to individuals subject to Immigration Detainers following a Secure Communities Query, including, but not limited to, costs, reimbursements, monetary agreements, and monetary incentives, including increased costs of detention.
- b. **Intergovernmental Service Agreements:** Any and all Records related to proposed, contemplated, existing, or prior Intergovernmental Service Agreements for detention facilities with Secure Communities Jurisdictions and Proposed Secure Communities Jurisdictions.
- c. **Contracts with Private Entities:** Any and all Records related to proposed, contemplated, existing, or prior contracts or communications with private companies or other private entities related to the development or implementation of Secure Communities.
- d. **Federal Costs of Secure Communities:** Any and all Records related to actual, estimated, or projected costs of the Secure Communities program to the federal government, including, but not limited to, Department of Homeland Security appropriations, and costs of increased detention and removal operations to ICE, EOIR, and United States Attorneys' Offices, and to the federal courts.

5) **Communications**

- a. **Any and all Records containing communications related to Secure Communities by, to, or between any of the following:**
  - i. **ICE:** ICE or any agent, officer, employee, or subdivision thereof;
  - ii. **DHS:** DHS or any agent, officer, employee, or subdivision thereof;
  - iii. **DOJ:** DOJ or any agent, officer, employee, or subdivision thereof, including, but not limited to EOIR, FBI, and FBI CJIS;

- iv. **State and Local Jurisdictions:** Secure Communities Jurisdictions, Proposed Secure Communities Jurisdictions, and any other state and local jurisdictions, including, but not limited to, any local or state LEAs, SIBs and Attorney Generals' offices;
- v. **The White House:** The White House, the President of the United States, his staff and advisors;
- vi. **United States Congress:** United States Congress, including, but not limited to, letters or emails to Senators or Representatives or staff members thereof, congressional committees, congressional briefings documents, congressional testimony, any other information provided to a member or employee of Congress, and any documents used in preparation of the aforementioned materials. Including but not limited to:
  - 1. Congressional inquiries regarding Secretary Napolitano's statements regarding Secure Communities in the week following the Criminal Alien Program presentation (November 2009);
  - 2. Information regarding ICE Assistant Secretary John T. Morton's meeting with the Congressional Hispanic Caucus on October 21, 2009;
  - 3. Briefings for Congress on 287(g) announcement on July 15, 2009;
  - 4. Briefing for Senate staff in September 2009 on fugitive operations and other issues related to Secure Communities; and,
  - 5. Briefing for Department of Justice Civil Rights Division in 2009.
- vii. **Non-Governmental Organizations (NGOs):** including emails, letters, or other documents distributed to NGOs or any documents used in preparation of such materials or in preparation for meetings with NGOs.

**b. Public Statements**

- i. **Press Releases:** Any and all Records related to or containing press releases or public internet postings that mention the phrase "Secure Communities" and any and all Records used in the preparation thereof;
  - ii. **Statements to Reporters or Media Outlets:** Any and all Records related to or containing statements by ICE or any official, officer, or employee thereof to a reporter or media outlet, including any opinion pieces or letters to the editor drafted for newspapers or internet media outlets and any Records used in the preparation thereof.
- c. Speeches:** Any and all Records related to speeches, statements, and presentations by ICE or any official, officer, or employee thereof, mentioning Secure Communities and any Records or drafts used in the preparation thereof.

**d. Secure Communities Public Relations Approach:**

Any and all Records related ICE's Secure Communities messaging, media, or communications approach. Including but not limited to:

- i. Any and all Records related to the development of the program's title, media approach, website, and public relations approach;
- ii. Any and all Records related to any media, communications, or consulting firm that assisted in the development or implementation of ICE's Secure Communities messaging, media, or communications approach, including any contract or agreement with such firm.

**6) Secure Communities Program Assessment Records**

- a. Any and all Records developed or used by ICE or DHS to evaluate, review, or monitor effectiveness or outcomes of Secure Communities.
- b. Any records containing assessments of the Secure Communities program, whether related to national assessments, assessments of specific Secure Communities Jurisdictions, related to any time period, or any interface or relation with any other ICE programs, divisions or initiatives.
- c. Secure Communities Stakeholder's Questionnaire:
  - i. Any and all Records related to the Form 70-008, ICE Secure Communities Stakeholder's ID Assessment Questionnaire (Stakeholder Questionnaire), OMB No. 1653-NEW, including earlier versions of the questionnaire, memoranda, communications, data gathered, or analysis of such data or questionnaire responses;<sup>15</sup>
  - ii. Any and all Records containing comments to the Stakeholder Questionnaire;
  - iii. Any Records containing follow-up communications related to the Stakeholder Questionnaire or other efforts to solicit community input;
  - iv. Any Records containing implementation, analysis, rejection, or other processing of the Stakeholder Questionnaire.

**7) Secure Communities Complaint Mechanisms and Oversight**

- a. Any and all Records related to a complaint mechanism or redress procedure for an individual, such as a United States citizen, erroneously subject to an Immigration Detainer following a Secure Communities Query or other Secure Communities related complaints.

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<sup>15</sup> Immigration and Customs Enforcement Secure Communities StakeholdersID Assessment Questionnaire

- b. Any and all Records relating to oversight, monitoring, evaluation and supervision of federal, state, and local actors involved in Secure Communities, including, but not limited to, local LEAs, SIBs, and ICE Field Offices.
- c. Any and all Records related to complaints or grievances filed by community members, detained individuals, non-governmental organizations, Congressional representatives, ICE or DHS working groups, state or local entities or employees, federal entities or employees, including those filed with ICE, DHS, SIBs, DHS' Office of Civil Rights and Civil Liberties, the DHS Office of the Inspector General, ICE Office of Professional Responsibility, the United States Attorney General or the Department of Justice, state or local authorities or civil rights bureaus, or the United States Congress or any member or committee thereof.

If you deny any part of this request, please cite each specific reason or exemption to FOIA that you believe justifies your refusal to release the information, and notify us of appeal procedures available to us under the law. The Requesters expect release of all segregable portions of otherwise exempt material. 5 U.S.C. § 552(b). The Requesters reserve the right to appeal a decision to withhold information or a denial of fee waivers. 5 U.S.C. § 552(a)(6)(A)(i).

#### **D. The Requesters**

*The National Day Laborer Organizing Network ("NDLON")* is a non-profit organization founded in 2001 whose mission is to improve the lives of day laborers in the United States. Toward this end, NDLON seeks to strengthen, connect and expand the work of its member organizations in order to become more effective and strategic in building leadership, advancing low-wage worker and immigrant rights, and developing successful models for organizing immigrant contingent/temporary workers.<sup>16</sup>

*The Center for Constitutional Rights ("CCR")* is a not-for-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. CCR's diverse docket includes litigation and advocacy around immigration detention, post-9/11 detention policies, policing, and racial and ethnic profiling. CCR is a member of immigrant rights networks nationally and provides legal support to immigrant rights movements. CCR also publishes newsletters, know-your-rights handbooks, and other similar materials for public dissemination. CCR has published reports on various aspects of detention and the criminal justice system in the United States. These and other materials are available through CCR's Development, Communications, and Education & Outreach Departments. CCR operates a website, [www.ccrjustice.org](http://www.ccrjustice.org), which addresses the issues on which the Center works. The website includes material on topical civil and human rights issues and material concerning CCR's work. All of this material is freely available to the public. In addition, CCR regularly issues press releases and operates a listserv of over 50,000 members and issues "action alerts" that notify supporters and the general public about developments and operations pertaining to

<sup>16</sup> NDLON has routinely been granted fee waivers in the past. See e.g., Freedom of Information Act to Customs and Border Protection, March 18, 2009, Case Number 2009F7375.